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SINGLE APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 835

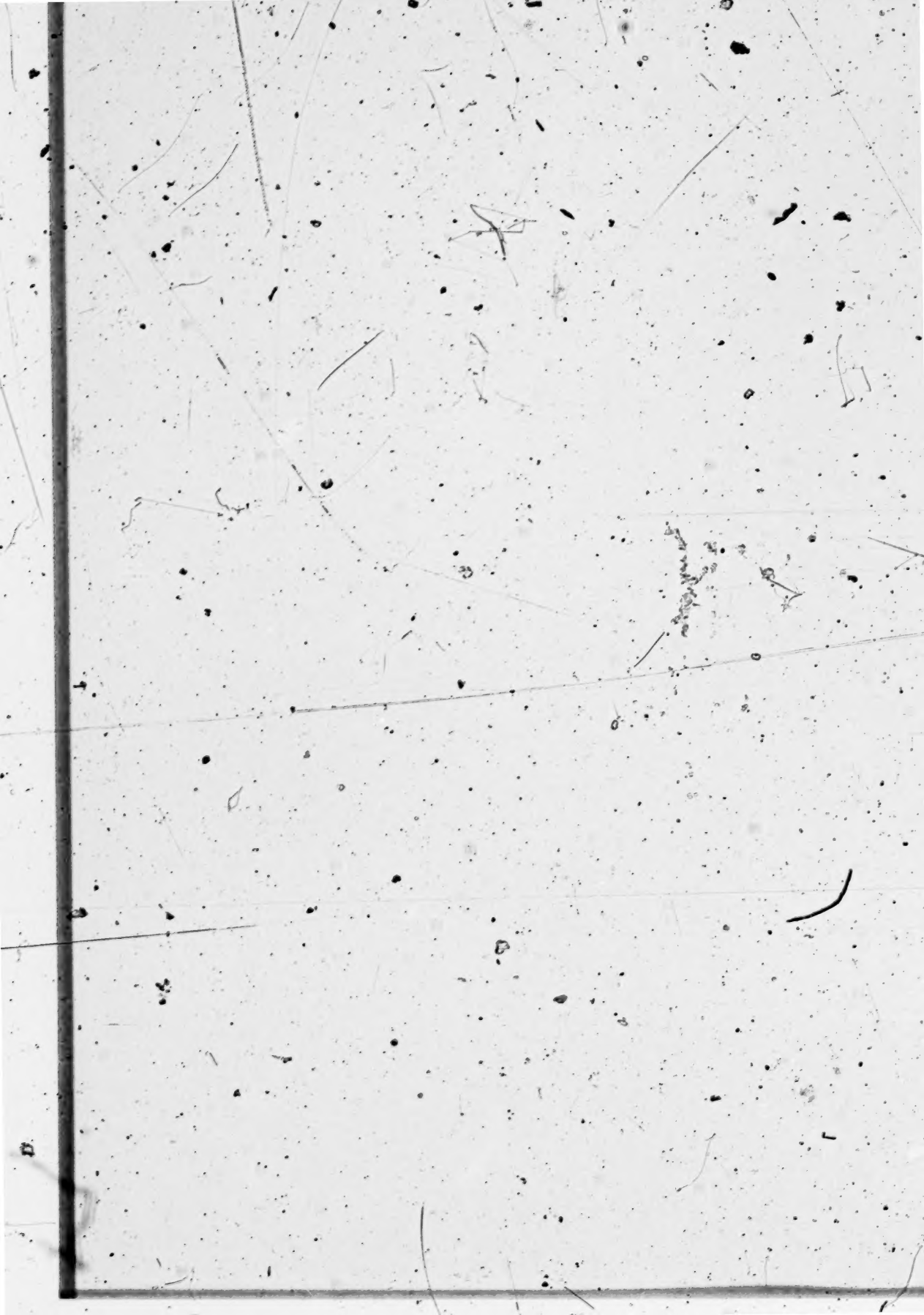
ROBERT KENNETH DEWEY,
Petitioner,

vs.

REYNOLDS METALS COMPANY,

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

PETITION FOR CERTIORARI
FILED OCTOBER 12, 1970
CERTIORARI GRANTED JANUARY 18, 1971



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APPENDIX
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT KENNETH DEWEY,
Plaintiff,

vs.

REYNOLDS METALS COMPANY,
Defendant.

File No. 5889

RELEVANT DOCKET ENTRIES

1968

May 31 Complaint filed.
June 19 Answer of Reynolds Metals Company, filed.
June 27 Plaintiff's Interrogatories to Defendant, filed.
Aug. 7 Stipulation for Amendment of Complaint and Amended Complaint, filed.
Aug. 14 Answers to Plaintiff's Interrogatories, filed.
Aug. 16 Order Allowing Plaintiff to Amend Its Complaint in accordance with Stipulation previously filed, filed.
Aug. 29 Defendant's Notice of Motion for Dismissal for Failure to State a Claim Upon Which Relief Can be Granted; Points and Authorities in Support of Motion; and Affidavit of Robert Lies, filed.
Sept. 23 Plaintiff's Brief in Opposition to Defendant's Brief and Motion to Dismiss for Failure to State a Cause of Action Upon Which Relief can be Granted. Attorney's Affidavit, filed.
Oct. 9 Defendant's Brief as to the Application of Constitutional Guarantee of Freedom of Religion under First Amendment, etc., filed.

Oct. 18 Order Denying Defendant's Motion to Dismiss, filed.

Nov. 5 Opinion Denying Defendant's Motion to Dismiss, filed.

1969

Mar. 17 Stipulation of Facts and Exhibits attached, filed.

Mar. 27 Brief for Defendant Reynolds Metals Company, filed.

Mar. 28 Plaintiff's Trial Brief, filed.

Apr. 4 Brief of National Jewish Commission on Law and Public Affairs, Amicus Curiae, filed.

Apr. 7 Hearing--Arguments by Counsel before the Court. Matter taken under advisement.

Apr. 24 Supplementary Brief for Defendant Reynolds Metals Company in Response to Amicus Curiae Brief of National Jewish Commission on Law and Public Affairs, filed.

June 6 Opinion of the Court, awarding Plaintiff reemployment and back pay from August 1, 1967, filed. Court to retain jurisdiction of case.

July 8 Notice of Motion and Motion for Entry of Judgment, filed.

July 14 Defendant's Notice of Motion for Supersedeas Bond; Points and Authorities in Support of Motion; Affidavits of Robert E. Jordan, Charles C. Hudgins, and Henry J. Wilcoxsin in Support of Motion, filed.

July 16 Affidavit of Robert Kenneth Dewey in Opposition to Defendant's Motion to Stay, filed.

July 16 Hearing on Defendant's Motion for Stay of Judgment Pending Appeal.

July 16 Opinion from the bench. Money aspect of Opinion will be stayed.

July 16 Reinstatement of Plaintiff as an employee will not be stayed.

July 16 The Court will withhold ruling on attorney's fees pending appeal.

July 25 Opinion on Motions for Entry of Judgment and Stay of Judgment, filed.

July 25 Judgment Granting Permanent Injunction, and Reinstatement, Credit for Seniority and Fringe Benefits, and Back Pay, filed.

July 25 Order Staying Execution in Part (specifically Paragraph 4 of Judgment) pending final disposition of this cause in appeal, filed.

July 31 Notice of Appeal by Defendant Reynolds Metals Company, filed.

July 31, Supersedeas Bond in amount of $15,000.00, filed.

Aug. 1 Transcript of proceedings held July 16, 1969, filed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1969

Aug. 4 1 envl. exhibits Certified record and exhibits returned to District Court 9/4/70

Aug. 4 Motion of Appellant for supersedeas, memorandum in support, with affidavits and exhibits A through E, filed; and cause docketed

Aug. 4 Affidavit of service by mail on the above motion

Aug. 4 Appearance of counsel for Appellant

Aug. 7 Appearance of counsel for Appellee

Aug. 8 Brief of Appellee in opposition to motion of Appellant for supersedeas bond and stay of judgment

Aug. 12 Proof of service on 8/7/69 of brief in opposition to motion for supersedeas bond and stay of judgment

Aug. 19	Order denying motion of Appellant to stay enforcement of the District Court judgment without prejudice to its renewal in the event overtime productions schedules which might invoke paragraph 2 of the judgment should be resumed (McCree, J.) R-187
Sep. 3	Certified record (1 vol. pleadings), filed; and cause docketed as of August 4, 1969
Sep. 10	Motion: Appendix and Appellant's brief to 10/13/69 (Granted, but no further extensions will be considered - JWP)
Oct. 9	Twenty-five copies of Brief for Appellant
Oct. 9	Ten copies of Appendix for Appellant
Oct. 9	Proof of service of brief and appendix for Appellant
Oct. 29	Motion of Equal Employment Opportunity Commission for leave to file a brief amicus curiae and present oral argument
Oct. 29	Motion for extension of time to 11/26/69 to file brief as amicus curiae
Nov. 3	Response to motions of Equal Employment Opportunity Commission to file brief Amicus Curiae, present oral argument and extend time for filing brief, with Appellant's proof of service
Nov. 6	Proof of service of brief for Appellee
Nov. 7	Twenty-five copies of Brief for Appellee
Nov. 10	Motion for extension of time to 11/26/69 to file brief Amicus Curiae, and Motion of National Jewish Commission on Law and Public Affairs for leave to file brief Amicus Curiae, with proof of service
Nov. 12	Order allowing Equal Employment Opportunity Commission to file brief amicus curiae by 11/26/69 and to present oral argument only to extent that Appellant may yield any time alloted him under the rules (McCree, J.) R-327

Nov. 13 Response of Appellant to motions of National Jewish Commission on Law to file brief amicus curiae, etc.

Nov. 26 Twenty-five copies of Brief of National Jewish Commission on Law and Public Affairs, Amicus Curiae

Nov. 26 Proof of service of brief of National Jewish Commission, amicus curiae

Dec. 1 Twenty-five copies of Brief for Equal Employment Opportunity Comm. as amicus curiae, with proof of service

Dec. 8 Request of Appellant for permission to file answer to Amici briefs, also in typewritten form (Granted. Reply brief by 12/24/69- JWP)

Dec. 19 Ten copies Brief of Appellant in reply to briefs of National Jewish Commission and Equal Employment Opportunity Commission

Dec. 19 Proof of service of Appellant's brief in reply to amici briefs

1970

Feb. 9 Cause argued and submitted (Before: Weick, Combs and O'Sullivan, JJ.) R-485

Feb. 16 Four copies of Supplemental Brief for Appellee

Feb. 17 Four copies of Supplementary Brief for Appellant

Feb. 19 Twenty-five copies of Supplemental Brief of Equal Employment Opportunity Commission as Amicus Curiae

Mar. 19 Four copies of Opinion of District Court at Cleveland, Ohio in Mrs. Sarah H. Beamer, et al. v. Alsco, Inc. (Copies distributed to the Court for counsel for Equal Employment Opportunity Comm.)

June 4 Judgment of the District Court reversed and case remanded with instructions to dismiss the complaint R-716

June 4 Opinion by Weick, J. (Combs, J., dissenting)

June 17 Twenty-five copies of Petition for Rehearing and Suggestion for Rehearing in Banc, with proof of service

June 26 Twenty-five copies of Supplement to Petition for Rehearing with copy of Opinion of Fifth Circuit in Hutchings v. United States Industries, Inc., and proof of service

June 29 Nine copies of Motion of National Jewish Commission on Law and Public Affairs, as Amicus Curiae, for leave to file memorandum in support of Appellee's suggestion for rehearing in banc, with copies of Memorandum attached (Distributed to the Court in banc)

July 1 Motion of Equal Employment Opportunity Commission for leave to file a brief in support of petition for rehearing and suggestions for rehearing en banc, as amicus curiae (Granted)

July 2 Twenty-five copies of Brief in support of Petition for Rehearing and Suggestion for Rehearing in Banc as Amicus Curiae tendered (Filed)

July 14 Motion of NAACP Legal Defense and Educational Fund, Inc. for leave to file a brief Amicus Curiae in support of petition for rehearing, with proof of service (Granted - PCW)

July 14 Twenty-five copies of Brief of NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae, in support of Appellee's petition for rehearing tendered (Filed July 27, 1970 and distributed)

July 30 Order referring petition for rehearing to panel for final disposition (Weick, J.) S-61

Aug. 11 Order denying petition for rehearing (Weick, McCree and O'Sullivan, JJ.) S-79

Aug. 11 Opinion on petition for rehearing (Weick, J., - McCree, J., dissenting)

Sep. 4 Mandate issued (Costs to be recovered by Appellant - $25.00 filing fee)
Opinion with mandate and opinion on petition for rehearing

Sep. 25 Letter from counsel for Appellee requesting preparation of record for the Supreme Court of the United States

Sep. 29 Certified record for certiorari application mailed to Clerk of United States Supreme Court

Oct. 19 Notice of filing petition for certiorari 10/12/70 (Sup. Ct. No. 835)

COMPLAINT
(Filed May 31, 1968)

The Plaintiff says:

1. This action arises under Public law 88-352, Title VII, Section 706 (e), July 2nd, 1964, 78 Stat. 259, 42 USC 2000e, et seq, and 28 USC 1343, as hereinafter more fully appears. The jurisdiction of this Court in invoked to secure protection and redress deprivation of rights secured by Title VII of the Act known as "Civil Rights Act of 1964," 42 USC 2000e, providing for relief against religious discrimination in employment.

2. The defendant is a corporation with its executive offices in Richmond, Virginia, and an "aluminum extrusion" plant in Grand Rapids at Beverly and Porter Streets, S. W., Kent County, Michigan.

3. The unlawful acts complained of herein occurred at the Grand Rapids plant site.

4. Plaintiff resides at 901 32nd St., S.W., in the City of Wyoming, Kent County, Michigan. That plaintiff is an adult.

5. The plaintiff was employed by the defendant from July 14, 1951, through September 12, 1966. During this period, plaintiff held a number of different jobs but, at the time of his termination, he was employed in the capacity of a die repairman.

6. Since 1962, the plaintiff has been a member of the Reformed Church and, consistent with the religious beliefs of the plaintiff as a member of said church, plaintiff has refused to work on Sundays. However, plaintiff consistently volunteered for

overtime and extra work to accommodate employer on every day but Sunday.

7. In 1960, a new Labor-Management Agreement was executed between the UAW-AFL-CIO and Reynolds Metals Company, and the 1960 Labor-Management Agreement provided that the Company could schedule compulsory overtime work, including Sundays. This provision was carried forward in the 1965 Labor-Management Agreement which was in effect at the time of the termination which is the basis of this action. Overtime scheduling for Sunday only became necessary in late 1965-1966.

8. From 1960 until 1965, the compulsory overtime provision was not exercised, and the Company functioned on a 5-day work week schedule. However, the defendant began scheduling Sunday overtime during late 1965.

9. In a bulletin dated September 20, 1965, the Management agreed to allow employees to be relieved of Sunday work if they obtained a qualified replacement.

10. Plaintiff refused to work scheduled Sunday overtime because it was against his religious beliefs. Plaintiff was scheduled to work Sunday, August 28, 1966; September 4, 1966; and September 11, 1966. He did not report for work on any one of these three Sundays, having previously made it expressly known to the defendant company that it was against his religious beliefs to work on Sundays and that he would not report for work on Sundays. Plaintiff further made it known that he would not seek a substitute to work in his place because it was his belief that if it was not right for him to work on Sundays, it would not be right to request someone to work in

his place on Sundays, regardless of the substitute's religious beliefs; but rather, that the Company should obtain the substitute so as to accomodate his religious beliefs. The September 11th absence resulted in a third written offense, and plaintiff was terminated pursuant to company rule 11.

11. At the time plaintiff was discharged, there were approximately 341 employees at the Grand Rapids Plant. Of this number, approximately 13 men were qualified to do the work of a die repairman. Further, an available substitute, an employee by the name of Zagman, was available and willing, as were other employees, to substitute for employees who did not wish to work on Sundays, but the Company refused to accept these substitutes unless the substitute was requested to work by the employee who was scheduled for Sunday overtime.

12. The defendant Company did obtain a substitute for an employee assigned for Sunday work who expressed the desire to attend a family reunion, but defendant would not obtain a substitute for an employee whose religious beliefs do not approve of working on Sunday.

13. The defendant's position with reference to requiring the employee to seek a substitute is inconsistent with the Equal Employment Opportunity Commission's guidelines, Title 29--Labor, Chapter XIV, Part 1605, Section 1605.1 (b), Federal Register, Volume 32, No. 134--Thursday, July 13, 1967, which states in part:

> "The Commission believes that the duty not to discriminate on religious grounds, required by Section 703 (a) (1) of the Civil Rights Act of 1964, includes an obligation on the part

of the employer to make reasonable accommodations to the religious needs of an employee and prospective employee where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer."

14. On January 4th, 1967, plaintiff filed a request with the Equal Employment Opportunity Commission, Regional Office, in Cleveland, Ohio, to assume jurisdiction and to investigate his charge against Reynolds Metals Company.

15. Following an extensive investigation by the Equal Employment Opportunity Commission, the Commission found Reasonable Cause to exist to believe that the Reynolds Metals Company was in violation of Section 703 (a) (1) of Title VII of the Civil Rights Act of 1964, as Alleged, a copy of which decision is hereunto attached as Exhibit A and made a part hereof.

16. The Equal Employment Opportunity Commission then attempted to eliminate the unlawful practice it found by conciliation as provided for in Title VII. However, the final disposition of this matter was unsatisfactory, and on May 3rd, 1968, the Commission directed a "30-Day Letter" to plaintiff advising him that conciliation efforts had failed to achieve voluntary compliance, and that the only remedy remaining to plaintiff was to institute a civil action in the United States District Court, pursuant to the provisions of Section 706 (e) of Title VII of the Civil Rights Act of 1964; 42 USC 2000e-5 (e), a

copy of which letter is hereunto attached as Exhibit B and made a part hereof.

WHEREFORE, plaintiff demands judgment against defendant, Reynolds Metals Company:

1. That defendant be ordered to reinstate plaintiff to the position which he held at the date of his termination on September 12th, 1966, with all back pay and other attendant fringe benefits accruing to an employee in the capacity in which plaintiff was employed at the time of termination, in accordance with the terms of the Labor-Management Agreement, including reinstatement of full seniority.

2. For such other or further relief as may be equitable in the premises.

VANDER VEEN, FREIHOFER & COOK
By: Donald F. Oosterhouse
Attorneys for Plaintiff
Business address:
950 Union Bank Building
Grand Rapids, Michigan 49502

Dated: May 31, 1968.

STIPULATION FOR AMENDMENT OF COMPLAINT
(Filed August 7, 1968)

It is hereby stipulated by and between the parties hereto that Plaintiff may file the Amended Complaint attached hereto, and service of a copy thereof is hereby accepted.

Dated: August 5, 1968.

VANDER VEEN, FREIHOFER & COOK
By: Peter R. Tolley
Attorneys for Plaintiff
Business Address:
950 Union Bank Building
Grand Rapids, Michigan 49502
CROSS, WROCK, MILLER & VIESON
Attorneys for Defendant
4200 Penobscot Building
Detroit, Michigan 48226
William Coughlin

ORDER ALLOWING AMENDMENT
(Filed August 16, 1968)

Upon reading and considering the Amendment stipulated by and between the Attorneys for the respective parties herein, upon motion of Plaintiff.

THEREFORE IT IS HEREBY ORDERED that Plaintiff may amend its Complaint herein in the form annexed to said Stipulation.

Dated: August 16, 1968.

NOEL P. FOX
United States District Judge

AMENDED COMPLAINT
(Filed August 7, 1968)

NOW COMES the Plaintiff, Robert Kenneth Dewey, by his attorneys Vander Veen, Freihofer & Cook, leave of court being first had and obtained pursuant to Stipulation of Counsel, and amends his complaint in the following particulars, to wit: by adding, as Paragraph No. 2 of Plaintiff's prayer and demand for Judgment the following:

2. That Defendant be ordered and directed to pay to Plaintiff reasonable attorney's fees as part of Plaintiff's costs in this cause pursuant to Title 42 USC 2000e-5 (K) And also by deleting the Number 2 and inserting Number 3 for the following to be the third paragraph of Plaintiff's prayer:

3. For such other or further relief as may be equitable in the premises.

This amended complaint is not intended to supersede the original complaint, and the original complaint remains in full force and effect except as above amended.

VANDER VEEN, FREIHOFER & COOK
By: Peter R. Tolley
Attorneys for Plaintiff
Business Address:
950 Union Bank Building
Grand Rapids, Michigan 49502

Dated: August 5, 1968.

ANSWER
(Filed June 19, 1968)

Defendant, REYNOLDS METALS COMPANY, by its attorneys, in answer to the Complaint heretofore filed in this matter, says:

1. Answering paragraph 1 of said Complaint, Defendant admits the allegations contained therein, except that it denies the applicability of said public law to Plaintiff's alleged claim.

2. Answering paragraph 2 of said Complaint, Defendant admits that it is a corporation with its

executive offices in Richmond, Virginia, but denies each and every allegation thereafter because of inaccuracies as to the description of the function of the plant and its geographical location. Further answering paragraph 2, Defendant alleges that it operates a plant engaged in the production of aluminum extrusions and aluminum billets at Beverly and Porter Streets, S.W. located in the City of Wyoming, Kent County, Michigan.

3. Answering paragraph 3 of said Complaint, Defendant denies both that the acts complained of were unlawful or that they occurred at any site located in Grand Rapids. Further answering paragraph 3, Defendant admits that the acts complained of occurred at the plant site in the City of Wyoming, Michigan.

4. Answering paragraph 4 of said Complaint, Defendant is without knowledge or information sufficient to form a belief as to the location of Plaintiff's residence but admits that Plaintiff is an adult.

5. Answering paragraph 5 of said Complaint, Defendant admits the allegations contained in paragraph 5, except Defendant says that Plaintiff was hired June 14, 1951.

6. Answering paragraph 6 of said Complaint, Defendant denies each and every allegation contained therein.

7. Answering paragraph 7 of said Complaint, Defendant denies each and every allegation contained therein. Further answering paragraph 7, Defendant admits executing a Labor Agreement with the UAW-AFL-CIO and its Local 277 in 1960 and again in 1965 containing among other provisions one which made

overtime work compulsory when assigned in accordance with the terms of said Agreement. Said provision was in effect when Plaintiff was discharged.

8. Answering paragraph 8 of said Complaint, Defendant denies each and every allegation contained therein.

9. Answering paragraph 9 of said Complaint, Defendant denies each and every allegation contained therein. Further answering paragraph 9, Defendant alleges that Plaintiff at the request of the Union prepared and issued a letter, dated September 20, 1965, interpreting parts of the Labor Agreement specifically providing that an employee would be relieved of his obligation to work overtime if said employee furnish a replacement considered qualified by the Company.

10. Answering paragraph 10 of said Complaint, Defendant admits the allegations contained therein except that Defendant denies the allegation that at all times while an employee of Defendant, Plaintiff refused to work scheduled Sunday overtime because of his religious beliefs. Further answering paragraph 10, Defendant alleges that Plaintiff was scheduled to work August 7, 1966 and August 14, 1966, both dates falling on Sunday, but a fellow employee worked as Plaintiff's replacement under the provisions of the interpretative letter of September 20, 1965. Defendant further alleges that after each violation of the Plant Rule, absence from work without reasonable cause, Plaintiff was warned and disciplined on a progressive basis finally resulting in his discharge.

11. Answering paragraph 11 of said Complaint, Defendant denies each and every allegation contained

therein. Further answering paragraph 11, Defendant alleges that Plaintiff told fellow employee Zagman prior to August 28, 1966 that Zagman was not to serve as his replacement on any further occasions.

12. Answering paragraph 12 of said Complaint, Defendant denies each and every allegation contained therein. Further answering paragraph 12, Defendant alleges that it excused an employee from Sunday work for a substantial and justifiable reason (attending a family reunion on a given Sunday). Defendant further denies that it has or did excuse such an employee from all Sunday work for such a reason.

13. Answering paragraph 13 of said Complaint, Defendant says that the allegations contained therein are conclusions of law and are denied. Further answering paragraph 13, Defendant alleges that it has made reasonable accommodations to Plaintiff's religious needs by establishing a replacement procedure as set forth in the September 20, 1965 letter of interpretation making possible the avoidance of all Sunday work. Defendant further alleges that there has been no discrimination as to Plaintiff because of religious beliefs or otherwise as evidenced by the prior investigation of this same subject matter and conclusions of no violation by the United States Office of Federal Contract Compliance and the Michigan Civil Rights Commission. Defendant further alleges that an arbitrator has interpreted the Labor Agreement and has upheld Defendant's position in denying grievances as to the same subject matter filed by Plaintiff protesting a disciplinary layoff and his subsequent discharge.

14. Answering paragraph 14 of said Complaint, because of lack of sufficient knowledge or information to form a belief, Defendant neither admits nor

denies same, and therefore leaves Plaintiff to his proof.

15. Answering paragraph 15 of said Complaint, Defendant denies each and every allegation contained therein except that Defendant has received a copy of the decision described in the Complaint as Exhibit A to which decision reference is made for the contents thereof.

16. Answering paragraph 16 of said Complaint, Defendant denies each and every allegation contained therein except that Defendant has received a copy of the letter described in the Complaint as Exhibit B to which letter reference is made for the contents thereof.

WHEREFORE, Defendant prays that this Court deny the relief prayed for in said Complaint and dismiss said Complaint with costs to the Plaintiff.

CROSS, WROCK, MILLER & VIESON
By: WILLIAM A. COUGHLIN, JR.
Attorneys for Defendant
Business Address:
4200 Penobscot Building
Detroit, Michigan 48226

OF COUNSEL:
FRED R. EDNEY
Assistant General Counsel
Reynolds Metals Company
6601 West Broad Street
Richmond, Virginia 23218

Dated: June 20, 1968.

INTERROGATORIES TO DEFENDANT
(Filed June 27, 1968)

NOW COMES the plaintiff, ROBERT KENNETH DEWEY, by his attorneys, Vander Veen, Freihofer & Cook, and addresses the following interrogatories to the defendant, to be answered under oath within 15 days in accordance with the Federal Rules of Civil Procedure:

1. What is the manufacturing function of the Reynolds Metals Company plant located in the City of Wyoming at Beverly and Porter Streets, S.W.? (Please provide a more comprehensive description of the plant's manufacturing function than simply that it produces "aluminum extrusions" and "aluminum billets").

2. How is the output production of the plant measured for any given unit of time? (That is, in dollars, sales volume, number of units produced, etc. per month or per year or per six month period, etc.)

3. How are the output requirements of the plant, described in the previous question and answer, defined, i.e. if output production is in number of units produced, is this for all departments, one particular department, etc.?

4. During the period from 1960 through 1966, inclusive, who were Reynolds Metals Company's principal customers with reference to the production of the plant in the City of Wyoming, Michigan?

5. Please state the output requirements these customers imposed upon the Reynolds Metals Company plant in Wyoming during the years 1960 through

1966, inclusively, in numbers of units produced by the Wyoming Plant, sales volume, etc.

6. During the period 1960 through 1966, inclusively, please state the number of employees employed at the Wyoming Plant of Reynolds Metals Company for each year above mentioned.

7. During the period 1960 through 1966, inclusively, please state the number of die repairmen or other employees qualified as die repairmen employed by the Wyoming plant and state the dates of such employment.

8. During the period 1960 through 1966, inclusively, state the number of employees required to work overtime and the date such overtime was required.

9. When were the die repairmen, employed at the Wyoming plant, first required to work overtime on a regular basis? (State the dates of such overtime and the number of die repairmen required to work overtime.)

10. When was compulsory overtime begun on a plant-wide basis?

11. What was the reason that compulsory overtime was scheduled on a plant-wide basis at the time answered in the previous question?

12. What are the job-skill requirements of a die repairman?

13. How do the die repairmen employed at the Wyoming plant of Reynolds Metals Company obtain their qualifications, experience, or training?

14. What length of training is required for one to become qualified as a die repairman suitable for employment in the Reynolds Metals plant in the City of Wyoming?

15. Please describe the nature of the work required of a die repairman at the Wyoming plant of Reynolds Metals Company.

16. Was it necessary for die repairmen to work overtime at any time during the period 1960 through 1966, inclusively?

17. If the answer to question 16 is in the affirmative, please state the reason that said die repairmen were required to work on an overtime basis.

18. With reference to paragraph 11 of the defendant's Answer, please state the source of the information upon which defendant relies in stating "Plaintiff told fellow employee Zagman prior to August 28, 1966, that Zagman was not to serve as his replacement on any further occasions."

19. Please give the names, addresses, and job titles (if employees) of all persons defendant will call as witnesses in its behalf.

20. Please state the name and address of the employee or employees directly in charge of the Wyoming plant during the period 1960 through 1966, inclusively.

21. Please state the names and addresses of all supervisory personnel in charge of the die repairmen during the period 1960 through 1966, inclusively.

22. Who scheduled overtime when overtime was deemed necessary during the period 1960 through 1966, inclusively? (If more than one employee, please state the names of all such employees and their dates of employment when in charge of scheduling such overtime.)

23. With reference to question 22, please state the names and addresses of persons in charge of scheduling overtime only for the die repair section during the period 1960 through 1966, inclusively, if a different person from the person in charge of scheduling overtime as set forth in the answer to question 22.

24. What is the defendant's reason for refusing to find substitute employees to work overtime on Sundays so as to accommodate other employees' religious beliefs?

25. How many die repairmen were discharged during the period 1960 through 1966, inclusively, for refusal to work on Sundays because of religious convictions?

26. What was the plaintiff's rate of pay (hourly rate) immediately before his dismissal?

27. Please state the average number of hours per week die repairmen were employed from September of 1966 to the present date.

28. Please provide a specific and detailed list of the fringe benefits provided to the die repairmen employed by Reynolds Metals Company from September 1966 through the present date.

29. Please provide a specific and detailed list of all fringe benefits accrued to the plaintiff immediately before his dismissal in September of 1966.

30. Please state the nature of the arrangement by which the fringe benefits as described in the previous two answers are provided. (For example, does the employer contribute a given amount toward some particular fund based upon an employees' rate of pay; how are these benefits determined, and where are the records of the cumulative benefits for all employees kept?)

31. Who is presently in charge of the records which reflect the information requested in the previous three questions?

VANDER VEEN, FREIHOFER & COOK
By: Peter R. Tolley
Attorneys for Plaintiff
Business Address:
950 Union Bank Building
Grand Rapids, Michigan

Dated: June 26, 1968.

ANSWERS TO PLAINTIFF'S INTERROGATORIES
(Filed August 14, 1968)

Defendant, Reynolds Metals Company, in answer to the interrogatories filed by Plaintiff, Robert Kenneth Dewey, says:

1. Makes alloy billets from virgin aluminum then extrudes metal to form shapes and tubing. These extruded shapes are then heat-treated, if required, straightened, cut to desired length, inspected, packed and shipped.

2. Pounds per month.

3. Plant wide--all departments necessary to produce end product.

4. The table below is a representative breakdown of the distribution of our customer shipments in:

	1961	1966
Automotive, truck, truck trailer	30%	10%
Architectural, building products	20	5
Industrial, electrical	15	20
Aircraft, government and private	10	10
Railroad	5	5
U.S. Government	5	15
Commercial domestic	5	33
Marine	5	2

In 1961 our rated capacity was 2 to 3 million pounds per month or approximately 25 to 35 million pounds per year.

In 1966 our rated capacity was 3 to 4 million pounds per month or approximately 30 to 48 million pounds per year.

5. Answered under No. 4.

6. January 1960--317
January 1961--298
January 1962--344
January 1963--270
January 1964--288
January 1965--288
January 1966--290

7. 1960--14--1950 through 1959
1961--15--1950 through 1959
1962--15--1950 through 1959
1963--13--1950 through 1959

1964--14--1950 through 1959
1965--14--1950 through 1959
1966--14--1950 through 1959

8. The compilation of the statistics required to answer this question is excessively burdensome. However, as evidence of the amount and distribution of overtime during the periods when the Dewey unauthorized absences occurred, the following is submitted:

August 28, 1966--190 of a total of 255 employees in the Plant worked.
September 4, 1966--117 of a total of 253.
September 11, 1966--124 of a total of 258.

There was significant overtime scheduled on twenty-four (24) of thirty-seven (37) Sundays between January 1, 1966 and September 11, 1966.

9. Since March 1960 in accordance with Section 3 of Article IX of the Labor Agreement. The compilation of the statistics required to further answer this question is excessively burdensome. As evidence of the overtime worked by die repairmen when the Dewey unauthorized absences occurred, the following is submitted:

August 28, 1966--7 of 11 employees in Die Repairman.
September 4, 1966--4 of 11 employees in Die Repairman.
September 11, 1966--5 of 11 employees in Die Repairman.

10. Since March 1960 in accordance with Section 3 of Article IX of the Labor Agreement.

11. The competitive nature of the business. During late 1965 and early 1966 the Grand Rapids Plant work schedule increased to such an extent as to require work not only on Saturdays but also on a number of Sundays. The production increase was occasioned by an increase in commercial business related to the increase in the general economy and by demands from the Vietnamese conflict arising from the fact that the Plant supplies product to prime contractors of the U.S. Government, the missile industry and the U.S. Government itself.

12. The primary duties consist of polishing, repairing and revising extrusion dies to produce extruded metal of proper contours, dimensions, and surface conditions.

13. Refer to the SUPPLEMENTAL AGREEMENT dated September 20, 1965, entitled SKILLED TRADES, beginning on page 57 of the AGREEMENT between the COMPANY and the UNION which is attached hereto and is likewise dated September 20, 1965. There are 9 steps (in the training program) of 440 hours each in order to qualify as a Die Repairman.

14. Refer to the SUPPLEMENTAL AGREEMENT between the COMPANY and the UNION under SKILLED TRADES mentioned above.

15. See answer to question No. 12.

16. Yes.

17. When other departments are scheduled to work overtime, the services of die repairmen are also needed.

18. Record of the Proceedings and testimony taken In the Matter of the Arbitration Between — REYNOLDS METALS COMPANY and UAW, LOCAL NO. 277 before Arbitrator Mark Kahn, on April 27, 1967.

19. In accordance with a telephone conversation with Peter Tolley, Esq. it is our present intention to call as a witness only Robert A. Lies who was the Personnel Manager during the period with which the suit is concerned.

20. 1960--William R. Comber, Plant Manager
1963--Charles C. Hudgins, Plant Manager (to present time).

21. Ray Call, 9832 Ivanrest Road S.W., Byron Center, Michigan; James Goulooze, 229 Lemyra S.E., Grand Rapids, Michigan; Benjamin Hall, 1937 Paris S.E., Grand Rapids, Michigan; Gerald Johnson, 3234 Ivanrest Road, Grandville, Michigan; Ronald Newberry, Unknown; Harold Oleson, Unknown; Henry Wilcoxson, 7453 Harmon Lane, Jenison, Michigan.

22. All supervisory personnel.

23. Supervisors shown in answer to question No. 21.

24. If one were to suggest that the Company could take one further step of accommodation, by the Company obtaining a replacement for Dewey, it is the position of the Company that this could not be done without undue hardship on the conduct of the business. Specifically, the obligatory overtime clause in the Labor Agreement was hard won in contract negotiations. Such a clause was necessary at

this Plant in order to enable the Plant to be worked six and seven days when customer demands required. If this Plant could not be worked overtime when necessary, the competitive nature of the business would require the Plant to be located elsewhere where it could compete with its industrial competitors such as Alcoa, Kaiser, etc. To remove the obligation of getting a replacement from Dewey the Company would waive the compulsory part of the obligatory overtime clause and would in effect relieve Dewey of his obligation to work overtime. If such were done for Dewey, as an accommodation, the same would have to be done for other employees who so requested relief for various reasons in order to have impartial administration of the contract. To thereafter refuse others the same consideration is obviously unfair and would result ultimately in an arbitrator directing that all be treated the same as Dewey--i.e., the Company obtain the replacements. This then would effectively relieve all other employees of their overtime obligation and in the opinion of management render it impossible to operate the Grand Rapids Plant.

25. One.

26. $3.320.

27. 44.3 average hours per week.

28. See the following attached books:

(1) AGREEMENT between Reynolds Metals Company, Grand Rapids, Michigan and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America UAW-AFL-CIO and Local 277 dated September 20, 1965 and referred to in the answer to question No. 13.

(2) YOUR REYNOLDS GROUP INSURANCE PROGRAM--Hourly Employees.

(3) Reynolds Metals Company PENSION PLAN (1966).

(4) Reynolds Metals Company SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN. (SUPPLEMENTAL VACATION and BENEFITS PLAN was eliminated prior to 1965 Agreement.)

29. None.

30. All benefits are paid for in full by the Company; the benefits being determined by the contractual plans shown under question No. 28, the records for which are kept at the Grand Rapids Plant.

31. Gordon L. Fox, Personnel Manager.

/s/ WILLIAM A COUGHLIN, JR.
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965-8135

OPINION DENYING DEFENDANT'S MOTION TO DISMISS
(Filed October 18, 1968)

This is an action arising under Title VII of the Civil Rights Act of 1964, 42 USC §2000 (e), which provides, inter alia, for relief against religious discrimination in employment.

Plaintiff, Robert Dewey, was employed by defendant from July 14, 1951, until September 12, 1966. Dewey held a number of jobs with defendant; at the time of his termination he was employed as a die repairman. Since 1962, plaintiff has been a member of the Reformed Church, and, consistent with his religious beliefs as a member of that church, he has refused to work on Sundays.

In 1960, a new labor-management agreement was executed between the UAW-AFL-CIO and defendant Reynolds Metals Co. That agreement provided that the company could schedule compulsory overtime work, including Sundays. This provision was carried forward in the 1965 labor-management agreement, which was in effect at the time of the termination which is the basis of this action.

From 1960 until late 1965, the compulsory overtime provision was not exercised and the company functioned on a five-day work week schedule. Late in 1965, the defendant began scheduling Sunday overtime, and in a bulletin dated September 20, 1965, the defendant agreed to allow employees to be relieved of Sunday work if they obtained a qualified replacement.

Dewey was scheduled to work on August 7, 1966, and August 14, 1966, both Sundays. Defendant alleges that, at plaintiff's request, a fellow employee worked as his replacement under the provisions of the bulletin dated September 20, 1965. However, Dewey did not report for work on August 28, 1966, September 4, 1966, or September 11, 1966, all Sundays, having previously made it expressly known to the defendant that it was against his religious beliefs to work on Sundays and that he would not procure a substitute because it was his belief that if

it was not right for him to work on Sundays, it would not be right to encourage another to work, regardless of the substitute's religious beliefs. Plaintiff said that the company should obtain a substitute so as to accommodate his religious beliefs.

The September 11 absence resulted in a third written offense and plaintiff was terminated pursuant to Company Rule 11. Believing that he had been discriminatorily discharged because of his religion, plaintiff filed a grievance to this effect, in accordance with the provisions of the 1965 collective bargaining agreement. The grievance was processed through various stages of the grievance procedure and was decided adversely to the plaintiff. An arbitration hearing was held April 27, 1967, and in an opinion and award dated June 29, 1967, arbitrator Mark L. Kahn decided against plaintiff. At the hearing, plaintiff was represented by the union in the persons of the International Representative and the chairman of the bargaining committee. He was not represented by an attorney, although the company was. A post-hearing brief was filed by the company, but no brief was filed by the union.

The arbitrator's decision was based in part on "the fact that a grievance protesting the discharge of Knight [another employee] in August 1966 for refusing Sunday work on religious grounds was later withdrawn [by the union]." (Arbitration award, at 8.)

Another reason given was the finding of the arbitrator that "the agreement does not permit a regular and continuing refusal of all Sunday work on religious grounds." (Arbitration award, at 8.)

Plaintiff thereupon filed a similar charge with the Michigan State Civil Rights Commission. The Commission found that there were insufficient grounds upon which to issue a complaint against defendant.

Plaintiff then filed a charge with the Equal Employment Opportunity Commission alleging that he had been discriminated against because of his religion. The Commission investigated the charge and determined that there was reasonable cause to believe that the employer had violated the provisions of Title VII. The Commission, unsuccessful in its attempts to obtain a conciliation agreement, notified the plaintiff of his right to bring a suit under Section 706 of the Act. This suit was instituted on May 31, 1968, and it is now before the court on a motion filed by defendant to dismiss the complaint on the ground that the plaintiff, by pursuing the grievance procedure under the collective bargaining agreement, had made a final, binding election of remedies and is therefore precluded from maintaining a suit to enforce his rights under Title VII.

The relevant legal issues easily divide into two: (1) whether by pursuing the grievance procedure to a conclusion, plaintiff made an election of forums which now precludes his suit in this court; (2) whether the constitutional guarantee of freedom of religion permits this court to review the arbitrator's decision or make a decision on the merits. Each of these issues will be discussed in turn.

I.

Defendant argues that by pursuing his remedy under the grievance procedure, plaintiff made a binding election of forums. Defendant relies on

Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967), which granted a motion to dismiss in a case involving a discharge for alleged improper discrimination based on sex. That court said at pages 337-338:

> "It is also the belief of the court that the employee should not be permitted to proceed on the same allegedly wrongful incidents both in the court and pursuant to his contractual remedies."

The reason for this requirement of an election was that "it would be inequitable and unconscionable to subject the defendant Colgate to two series of extensive litigation, one series in this court and then another series under the labor contract." Id. at 366-7.

The second case relied upon by defendant is Washington v. Aerojet-General Corp., 282 F. Supp. 517 (C.D. Cal. 1968). That case involved a charge of racial discrimination, and the court refused to go as far as the court in Bowe, supra. In Washington, a settlement had been reached between the union and the company prior to arbitration. The court held that once that settlement was accepted by both sides, the employee would be precluded from continuing with any court action under the Civil Rights Act.

Both these cases are distinguishable from the case at bar. The Bowe case dealt with alleged discrimination on the basis of sex, whereas this case deals with a discrimination against the freedom of religion, one of the most cherished and protected constitutional rights. Washington involved a settlement agreed to by both sides, a far different situation

than is presented in this case. Both decisions are now on appeal.

In addition to being distinguishable, these cases should be critically analyzed to determine whether their reasoning is valid. The reasoning given by the Bowe court itself argues against the decision in that case:

> "The court finds a fundamental difference between a claim for the violation of a collective bargaining agreement and a claim for the violation of the Civil Rights Act of 1964. The latter is a statutory embodiment of constitutional rights that all persons are entitled to enjoy, while the former has as its primary purpose the maintenance of industrial peace between labor and management. It is the belief of the court that an employee has the right to come before the Court and assert his right under the Civil Rights Act of 1964 without regard to any contractual remedies also available to him." 272 F. Supp. at 337.

The doctrine of election of remedies has traditionally been applied in cases where the same or nearly identical issues were being pursued in two forums. See, e.g., Penn Gen. Cas. Co. v. Commonwealth of Pa., ex rel Schnider, 294 U.S. 189 (1935). This doctrine has also been used in the labor field relative to proceedings both before an arbitrator and then before the National Labor Relations Board on the same issue. The standards set forth in Spielberg Mfg. Co., 112 NLRB 1080 (1955), and Raytheon Co., 140 NLRB 883 (1963), are instructive: (1) The factual issues before the arbitrator and the Board must be indentical; (2) the

hearing and evidence presented must deal adequately with all factual issues; (3) the arbitrator must have decided the factual issues involved before the Board; (4) the hearing must be fair and regular in all respects; (5) the decision of the arbitrator must be in accordance with the law.

The factor to be emphasized in the instant case is whether the arbitration hearing dealt with the same issues that are present in this proceeding before this court. The issues treated by the arbitrator were wholly different from the issues raised in this Civil Rights Action. The labor contract involved, Article XI, Section 2, Step 5, stated:

> "The arbitrator shall have authority to interpret this agreement for the purpose of settling the grievance, but he shall have no authority to add to or detract from, or change this agreement, or arbitrate wages for new changes, jobs, or production standards."

Under this provision of the contract, the arbitrator correctly limited himself to the contract language. At no time did the arbitrator deal with the issues present in this case, that is, the issues relevant to the Civil Rights Act and the First Amendment.

It is understandable that any union member would first proceed to raise any rights he felt were due him under the contract. Proceeding first through arbitration is in accord with federal labor law. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960). Plaintiff should not be penalized for first proceeding with his contractual remedies through the arbitration process,

as preferred and indeed mandated by federal labor law. He should retain his rights to also bring a civil rights action. This reasoning is especially justified in this case, where the employee was not represented by counsel at the arbitration hearing, although the company was, and where the union did not file a brief on behalf of the employee though the company filed a brief on its behalf.

Under all these circumstances, the arbitration award should not preclude an action in this court based upon a statute rather than the collective bargaining agreement. To hold otherwise would be to require the employee to have come to this court without attempting a settlement through the contractual processes, as preferred by the national labor law; plaintiff would also have been required to choose between two different remedies when both remedies are provided to insure that plaintiff's contractual, statutory and constitutional rights are protected. When rights of this type are involved, they outweigh the interest of the company-defendant in avoiding the inconvenience and expense of multiple actions. Thus, a trial should be held on the merits of plaintiff's claim that defendant has violated the Civil Rights Act.

II.

Defendant argues that the First Amendment does not apply to labor contracts or proceedings thereunder, because they are not actions of the government, but are rather purely private activities. Defendant further argues that even if the First Amendment could be said to apply to this situation, the decision of the arbitrator should be final and conclusive with respect to plaintiff's First Amendment rights.

Both defendant's arguments are invalid. First, the arbitration proceeding cannot be viewed as purely a private one. The National Labor Relations Act and the famous Triology cases(1) clearly establish a federal labor policy of arbitration as a substitute forum for the public judiciary in which to dispose of industrial disputes.

Since the arbitration tribunal or arbitration proceedings are in many instances a substitute for traditional judicial remedies, it follows that the rules of due process and other constitutional protections must extend to the substitute proceedings lest the courts, through approval of arbitration agreements in arbitration proceedings, support proceedings which result in the deprivation of statutory and constitutional rights. If this grievance-arbitration system, which exists as a result of court approval, is permitted to dispose of disputes involving substantial rights without heeding constitutional protections, the courts will find themselves supporting and giving credence to decisions, which if rendered by the courts would be a violation of the free exercise of religion clause of the First Amendment or some other essential constitutional protection.

The courts cannot leave to the arbitrator final decisions regarding constitutional rights. This is especially true in the instant case, where the arbitrator was limited to the contract in rendering his decision.

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(1) United Steelworkers v. American Mfg. Co., v. Warrior & Gulf Nav. Co., v. Enterprise Wheel & Car Corp., 363 U.S. 564 (1960).

This court is not limited by the contract, but also has before it the Civil Rights Act and the Constitution of the United States. The constitutional issue is not one which can be passed over lightly, as was done by the arbitrator in a sentence of two. The constitutional issue is whether defendant effectively denied plaintiff the right of free exercise of his religion by conditioning plaintiff's right to work on his willingness to forego his religious beliefs or to compromise them by encouraging someone else to work on Sunday. An analogous choice of this type was found to be unconstitutional in Sherbert v. Verner, 374 U.S. 398 (1963), where a Seventh Day Adventist was forced to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand.

The court at this time is not expressing an opinion as to the validity of plaintiff's claims. The court is rather refusing to allow a decision by the arbitrator to be the final one with respect to plaintiff's constitutional rights. The right in question, freedom to exercise one's religion, is too precious to require plaintiff to accept an arbitrator's decision regarding it. Again, the guiding principle is that plaintiff should not be penalized and should not be precluded from his rightful statutory and constitutional remedies because he followed the mandated practice under federal law of first submitting his dispute to the private grievance procedure.

For all these reasons the motion to dismiss is denied.

Dated: November 5, 1968.

/s/
District Judge

STIPULATION OF FACTS
(Filed March 17, 1969)

NOW COMES the Plaintiff by his attorneys, Vander Veen, Freihofer & Cook and the Defendant by its attorneys Cross, Wrock, Miller & Vieson, and hereby mutually stipulate and agree that the following facts are true and that proofs need not be presented at the trial of the within cause in support of the matters to which the parties hereby stipulate.

1. Plaintiff was employed by Defendant at its Wyoming, Michigan plant on June 14, 1951, holding various jobs until he became a die repairman, which was the job he held at the time of his discharge September 12, 1966.

2. Defendant is a corporation with its executive offices in Richmond, Virginia and maintains a "job type" plant in Wyoming, Michigan where it produces on an order basis aluminum extrusions and aluminum billets for such industries as architecture, building, transportation, aircraft and missile.

3. Prior to 1964 the plant operated on a five day weekly schedule. Because of increased business, during 1964 and 1965 the plant operated on "five plus" days weekly schedule. During late 1965 and 1966 the plant operated on a "six plus" days weekly schedule utilizing Saturdays regularly and requiring numerous Sunday work schedules. Between January 1, 1966 and September 11, 1966, Sunday production took place on twenty-four (24) of thirty-seven (37) Sundays.

4. The production and maintenance employees at Defendant's plant (which classifications include that of Plaintiff) have been and continue to be represented by the International Union, United Automobile,

Aerospace and Agricultural Implement Workers of America (now known as UAW) and its Local 277 (hereinafter called the Union).

5. Plaintiff was at all times during his employment by Defendant a member of the Union in good standing.

6. Prior to the 1960 Labor Agreement between Defendant and the Union, overtime was performed on a basis that was voluntary on the part of each employee and under such circumstances the scheduling of production was made impossible on certain overtime days.

7. The 1960 Labor Agreement and subsequent Labor Agreements, including the 1965 Labor Agreement, between Defendant and the Union include a section giving Defendant the right to set overtime schedules and make it compulsory for the employees to work such schedules unless they have a substantial and justifiable reason for not doing so. The section in question in the 1965 Labor Agreement is found at Article IX, Section 3, and reads as follows:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent."

(Exhibit A attached hereto).

8. The 1965 Labor Agreement also provides, in Article IX, Section 4, that overtime work shall

be divided as equally as possible among employees in each job classification in each department; that if less than all of the qualified employees in a classification in a department are needed on other than a normal straight time work day, the number required will be scheduled in accordance with the overtime chart and when the required number of employees cannot be obtained in this manner, overtime is to be assigned by the Defendant Employer among the employees who are offered such overtime in the inverse order of their seniority.

9. In response to a Union objection to the compulsory overtime clause, the Defendant Employer, under date of September 20, 1965, issued an interpretation of the Labor Agreement which said in effect that any employee assigned to overtime could be relieved from that assignment by arranging for another qualified employee to replace him. This system of employees furnishing their own replacements has been utilized extensively since September 1965. (Exhibit B attached hereto).

10. Defendant established in 1957 Plant Rules and a copy of such Rules was posted in each department. Plant Rule 11 includes "absence from work without reasonable cause" and calls for a warning for the first offense, a one week layoff for the second offense and discharge for the third offense. Said Plant Rules also state: "Depending upon the seriousness of the offense and other factors in the judgment of Management, the Company reserves the option of imposing a lesser penalty than that indicated." (Exhibit C attached hereto).

11. Plaintiff has been a member of the Faith Reformed Church since December 4, 1961. This church is a local church in the Reformed Church of America.

12. Plaintiff never volunteered for Sunday overtime work from December 4, 1961 to date of discharge because of his religious beliefs.

13. Plaintiff did volunteer for overtime work on days other than Sunday since becoming a member of the Faith Reformed Church.

14. Plaintiff was scheduled to work overtime on Sunday, November 21, 1965 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs; he was given a verbal warning; was advised of the necessity (in Defendant's judgment) of Defendant scheduling work on a seven day basis and was advised that a repetition of his conduct would lead to disciplinary action under Plant Rule 11.

15. Plaintiff was scheduled to work overtime on at least five (5) Sundays from January 1966 to August 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff did not work on such assigned days but did obtain replacements on each of the days in question in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto.

16. Plaintiff was scheduled to work overtime on Sunday, August 28, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs and refused because of his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto. At this time Plaintiff told a fellow employee, Jake Zagman, who had been serving as

his replacement that Plaintiff would not request said fellow employee to serve as his replacement again. Plaintiff was given a written warning for violation of Plant Rule 11. (Exhibit D attached hereto). Seven (7) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-five (255) employees in the plant, one hundred ninety (190) worked.

17. Plaintiff was scheduled to work overtime on Sunday, September 4, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs and refused because of his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto. Plaintiff was given a written warning together with a disciplinary layoff of three (3) days for violation of Plant Rule 11. (Exhibit E attached hereto). Four (4) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-three (253) employees in the plant, one hundred seventeen (117) worked.

18. Plaintiff filed Grievance No. 621 dated September 7, 1966 with Defendant. (Exhibit F attached hereto).

19. Plaintiff was scheduled to work overtime on Sunday, September 11, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff again refused to work because of his religious beliefs and also refused because of his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 and as more specifically set forth in Exhibit B attached hereto. Plaintiff was discharged for violation of Plant Rule 11. (Exhibit G

attached hereto). Five (5) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-eight (258) employees in the plant, one hundred twenty-four (124) worked.

20. Plaintiff filed Grievance No. 629 which was received by Defendant's Personnel Department on September 19, 1966. (Exhibit H attached hereto).

21. Both the Defendant's interpretation and past practice indicate that the Defendant cannot compel an employee to accept an overtime assignment in other than his own classification.

22. On and after August 28, 1966 there were two (2) employees who were in other classifications, but who nonetheless were qualified as die repairmen.

(a) One of the aforementioned employees, Jake Zagman, worked on August 28, 1966 and on September 4, 1966. Zagman did not work on September 11, 1966 but was available for work; however, Defendant could not compel Zagman to work outside his classification.

(b) William Boyer, the second of the two aforementioned employees, worked on August 28, 1966 and on September 11, 1966. Subsequent to September 4, 1966 but prior to September 11, 1966 he had been reclassified as a die repairman and worked in such capacity on September 11, 1966. Boyer did not work on September 4, 1966 but was available for work; however, Defendant could not compel Boyer to work outside his classification.

23. If Plaintiff were to be relieved of the obligation of obtaining his replacement in accordance with the replacement system referred to in Paragraph 9 above, it is Defendant's contention that this would result in a waiver of the compulsory overtime provisions of the Labor Agreement.

Further, Plaintiff does not by this Stipulation intend agreement with or acceptance of Defendant's contention; but rather, the parties have so stipulated in order to include that which Defendant included as a defense in its Answer No. 24 to Plaintiff's Interrogatory No. 24, which Answers and Interrogatories have hereinbefore been filed.

24. The sincerity of Plaintiff's personal religious beliefs is not contested by the Defendant.

25. Plaintiff had expressed his religious beliefs against Sunday work to the Defendant prior to having been scheduled for the above three (3) Sundays in 1966.

26. Prior to the discharge of Plaintiff, Defendant had taken disciplinary action as to a number of other employees who refused overtime work assignments on Sunday because of their religious beliefs when scheduled pursuant to the compulsory overtime provisions of the Labor Agreement. The following are the disciplinary actions taken: Written warnings were issued to four (4) employees; three (3) day layoffs were given to three (3) employees; four (4) employees were discharged, which number included two (2) supervisors. Defendant had also taken disciplinary action as to other employees who refused overtime work assignments on days other than Sunday when scheduled pursuant to the compulsory overtime provisions of the Labor Agreement.

27. Pursuant to the Collective Bargaining Agreement between Defendant and the Union, Plaintiff's grievances pertaining to his three (3) day layoff and his discharge were processed through the various steps of the Grievance Procedure, finally resulting in the grievances being submitted to arbitration. Under date of June 29, 1967 the arbitrator sustained the layoff and the discharge and denied the grievances. (Exhibit I attached hereto).

28. During the period 1960 to 1966 inclusive, no employee employed by Defendant at its Wyoming plant in the die repair classification refused to work on Sunday because of religious beliefs and refused to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above, except the Plaintiff Dewey.

29. On or about September 16, 1966, Plaintiff filed with the Michigan Civil Rights Commission an application for the issuance of a Complaint alleging that he had been subjected to discriminatory treatment and discharged because of religious beliefs. Defendant was advised of the filing of such application by letter from the Civil Rights Commission dated September 19, 1966. (Exhibit J attached hereto).

30. Under date of December 13, 1966 (mailed on December 14, 1966), the Michigan Civil Rights Commission issued a Notice of Disposition and Order of Dismissal stating that the Commission had found insufficient grounds on which to issue a Complaint and that the application for Complaint was denied. (Exhibit K attached hereto).

31. Under date of January 4, 1967, Plaintiff filed a charge with the Equal Employment Opportunity

Commission alleging discrimination on the basis of religion. (Exhibit L attached hereto). The charge was served on Defendant on July 19, 1967.

32. Under date of January 5, 1968 the Equal Employment Opportunity Commission, notwithstanding the recommendation of the Regional Director of the Cleveland, Ohio Regional Office that the Equal Employment Opportunity Commission find no probable cause, issued a letter to Defendant Employer stating that the Commission had determined that there was reasonable cause to believe that Defendant Employer had engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964. (Exhibit M attached hereto).

33. Following conciliation efforts by the Equal Employment Opportunity Commission, said Commission in a letter dated May 3, 1968 advised Plaintiff of the failure of conciliation efforts and notified Plaintiff that he could within thirty (30) days institute a civil action in the appropriate Federal Court alleging an unlawful employment practice. Within thirty (30) days after said letter, Plaintiff commenced this action.

34. The foregoing Stipulation is intended to cover all facts except those relating to Plaintiff's alleged damages. If the parties are not able to stipulate as to such alleged damages, there will be a further hearing covering the matter of damages.

Respectfully submitted,

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Dated: 3-15-69
OF COUNSEL:
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Assistant General Counsel
Reynolds Metals Company
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TRIAL EXHIBIT A
Article IX
OVERTIME PROVISIONS

Section 1.

(a) All work performed in excess of eight (8) hours in any twenty-four (24) hour period, or all work performed in excess of forty (40) hours in any one work week shall be paid for at the rate of time and one-half.

(b) Double time and one-quarter shall be paid for work performed on the holidays enumerated in Article X, Section 1.

(c) Time and one-half shall be paid for work performed on Saturdays.

(d) Double time shall be paid for work performed on Sundays.

(e) Exception to the above sub-paragraphs (c) and (d) shall be made where continuous operation

is necessary. On the seventh consecutive day worked within a work week, double time shall be paid for work performed on the seventh day. Time and one-half shall be paid for all work performed on Sunday. Holiday hours shall be used in computing time for overtime if an employee would otherwise have been scheduled to work if the holiday had not occurred.

Section 2. In the event premium time is applicable to the same hours worked under any two or more provisions of this Agreement, only the single highest premium rate shall be paid.

Section 3. All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent.

Section 4. Insofar as is practicable without reducing the efficiency of the plant, overtime work in each job classification shall be divided as equally as possible among the employees of each department within their job classification. The distribution of overtime opportunities shall be carried out in the following manner:

(a) If an employee in any classification is to be worked beyond the end of and continuous with his shift on a normal straight time day, the opportunity to perform such work shall be offered, in accordance with the overtime chart, to all employees on that same shift in that classification within that department who are qualified to perform the work and who are present and available. If an insufficient number of such employees accept the offer of such

overtime, the required number of employees shall be selected by the COMPANY from among such employees in the inverse order of their seniority.

(b) If an employee in any classification is to be worked prior to the start of his regular shift but continuous therewith on a normal straight time day, the opportunity to perform such work shall be offered, in accordance with the overtime chart, to all employees on that same shift in that classification within that department who are qualified to perform the work. If an insufficient number of such employees accept the offer of such overtime, the required number of employees shall be selected by the COMPANY from among such employees in the inverse order of their seniority.

(c) If, in addition to employees obtained under the above procedure, other employees are needed to perform any work on an overtime basis on a normal straight time day in a classification within a department, the COMPANY will attempt to obtain such additional employees by offering such overtime work, in accordance with the overtime chart to the other employees within that classification in that department who are qualified to perform such work, unless it is clearly impractical to do so. Where the foregoing procedure is clearly impractical, such overtime work will be offered within the Production Department, to qualified employees in the applicable Line of Progression from those employees who are present and available. Where the foregoing procedure is clearly impractical in departments other than the Production Department, such overtime work will be offered to qualified employees within the department who are present and available. If sufficient employees are not obtained in that manner the COMPANY may select any qualified employee to perform such work.

(d) When less than all the employees in a classification within a department who are qualified to perform the work are needed to work on an overtime basis on other than a normal straight time day, the COMPANY will schedule the needed number of employees who are qualified to perform such overtime work in accordance with the overtime chart. Such schedule shall be posted not later than the Thursday work day of the week involved. If an employee scheduled to work such overtime notifies the COMPANY prior to 5:00 P.M. Friday that, for a substantial and justifiable reason, he would prefer not to work such overtime, the COMPANY will attempt to obtain a qualified replacement by offering, in accordance with the overtime chart, the work to other employees within that classification in that department who are qualified to perform the work but who had not been scheduled to work such overtime. If a qualified replacement is not obtained, the required number of employees shall be selected by the COMPANY from among the employees who were offered such overtime in the inverse order of their seniority.

(e) If employees are needed to work overtime on other than a normal straight time day who have not been obtained under the scheduling and replacement process set forth in (d) above, the COMPANY will attempt to obtain the needed employees by offering such overtime work, in accordance with the overtime chart, to the employees within that classification in that department who are qualified to perform such work, unless it is clearly impractical to do so. Where the foregoing procedure is clearly impractical, the COMPANY may select any qualified employee to perform such work.

(f) When all employees within a classification in a department have been scheduled to work overtime on other than a normal straight time day, or

in circumstances arising from unexcused absenteeism of employees schedules to work overtime on such a day, the procedures set forth in (d) and (e) above shall not apply.

(g) If a vacancy occurs that creates overtime, employees within the classification who are present and available in the plant, where said vacancy occurs will have first choice at said overtime.

If it shall become necessary to call an employee from outside the plant those employees within the classification in which the vacancy occurs shall be called in accordance with the overtime chart.

Section 5. If an employee who should have been offered overtime under the provisions of Section 4 is overlooked and if the work which such employee would have performed is actually performed at overtime rates:

(a) by an employee not in the same classification as the overlooked employee, the overlooked employee shall be paid the amount he would have received had he performed such work.

(b) by an employee in the same classification as the overlooked employee, when the overlooked employee brings the matter to the attention of the COMPANY, the COMPANY will offer such employee the next available overtime within his classification if he is qualified to do such work and in the event the COMPANY fails to offer such employee such overtime the COMPANY will pay the employee the amount such employee would have earned had the COMPANY not overlooked such employee the second time.

Section 6. The COMPANY will maintain and post each week the overtime charts for each department showing the relative positions of the employees with respect to the overtime worked and/or charged.

Section 7. Any employee who is called in before his regular shift for work continuous with his regular shift shall not be sent home prior to the end of his regular shift.

Section 8. The COMPANY will not change the present established shift schedules without giving at least forty-eight (48) hours prior written notice to the UNION of the reasons therefor; provided however, that the COMPANY may not, without the consent of the UNION, change the present established shift schedules more than one (1) hour earlier or later than the present established shift schedules. When operating conditions make it necessary to change the schedules of any employees, the shift starting time for such employees shall be uniform for the entire work week and such employees shall be paid the shift differential applicable to the established shift schedule in which the majority of such employees' time is worked.

TRIAL EXHIBIT B

September 20, 1965

Mr. Sam Sella, Jr.,
Chairman, Negotiating Committee
Local 277, UAW-CIO
Grand Rapids, Mich.

Dear Mr. Sella:

At the request of the Committee, of which you are Chairman, we are clarifying the Company's

position regarding the meanings of certain parts of the contract agreed to during recent contract negotiations.

ARTICLE IX, Section 3. OVERTIME PROVISIONS. The COMPANY will relieve an employee of the obligation of performing overtime work under this Section under the following conditions:

(a) The employee furnishes a qualified replacement to perform the scheduled overtime.

(b) Questions of qualification will be determined by the Foreman.

(c) The employee working as a replacement will receive the rate of the job performed.

ARTICLE XIV. REDUCTION OF FORCE.
and
ARTICLE XIX. PROMOTIONS AND FILLING OF VACANCIES.

The COMPANY considers present employees within a Line of Progression to be eligible to be trained to perform any job, that they obtain under the provisions of the above Articles, within that Line of Progression unless otherwise declared unqualified for such training by agreement between the COMPANY and the UNION. Training of employees in the Production Department Pool classifications will be limited to the lowest direct successive step in a Line of Progression.

SUPPLEMENTAL AGREEMENT
Concerning SKILLED TRADES dated.....
day of.....

Paragraph V: The COMPANY considers that employees in the Mechanical Maintenance, Electrical Maintenance, Die Repair and Die and Machine Shop Departments shall not be subject to the provision restricting them from job rights outside their respective Lines of Training Progression until they shall have accumulated ten (10) years experience in their respective Line of Progression, or its equivalent experience.

PERSONAL TIME

The COMPANY'S position regarding the use of personal time by employees for drinking coffee or eating lunch, fruit, etc., is as follows:

In general, such activities are restricted other than at scheduled lunch periods, however, employees may have coffee, lunch, fruit, etc., when a machine or equipment is down and/or unavoidable delay has occurred, and if it does not interfere with their assigned work. Large groups or gatherings of employees participating in the above mentioned activities will be construed to mean a violation of the understanding with the UNION and will be dealt with on an individual basis.

Your very truly,
REYNOLDS METALS COMPANY
C. C. Hudgins
Plant Manager

TRIAL EXHIBIT C
Revised Plant Rules Effective March 15, 1957
REYNOLDS METALS COMPANY
Grand Rapids Plant

PLANT RULES

Relatively few employees are discharged "for cause". So as to further reduce the number discharged we are listing some of the commonly recognized reasons, feeling that most people want to play the game fairly and will abide by the rules. These rules and penalties are established to protect both the Company and the Employees. Depending upon the seriousness of the offense and other factors in the judgment of Management, the Company reserves the option of imposing a lesser penalty than that indicated.

FIRST OFFENSE--Warning.
SECOND OFFENSE--Warning.
THIRD OFFENSE--Discharge.
Assignment of wages or receipt of garnishments. (36)
FIRST OFFENSE--Warning.
SECOND OFFENSE--1 Week Layoff.
THIRD OFFENSE--Discharge.

Horseplay, scuffling, running or throwing things at any time on Company property. (4)

Wasting time or loitering on Company property during working hours. (5)

Gambling, lottery, or other games of chance on Company premises at any time. (6)

Misuse or abuse of property of employees or the Company. (10)

Failure to notify the Company in advance when expect to be absent, except in an emergency; absence from work without reasonable cause. (11)

Excessive absenteeism, and/or tardiness. (13)

Reporting late for work without reasonable cause. (14)

Making scrap unnecessarily, careless workmanship, or not following directions of supervision. (20)

FIRST OFFENSE--1 Week Layoff to Discharge.
SECOND OFFENSE--Discharge.
THIRD OFFENSE--

Immoral conduct or indecency. (22)

The making or publishing of false, vicious, or malicious statements concerning any employee, supervisor, the Company or its products. (23)

* * * *

FIRST OFFENSE--Discharge.
SECOND OFFENSE--
THIRD OFFENSE--

Falsification of any record. (1)

Fighting on Company property at any time. (2)

Misuse or removal from the premises without proper authorization Company lists, blueprints, records or confidential information of any nature. (3)

Ringing the clock card of another employee. (7)

Restricting output or encouraging restriction of output. (8).

Deliberate abuse, misuse, or deliberate destruction of Company property, tools, equipment or the property of employees in any manner. (9)

Throwing refuse or objects on floors, out windows or doors, on Company property at any time. (21)

Creating or contributing to unsanitary conditions. (30)

Violation of safety rules and practices. (31)

Posting or removal of notices, signs or writing in any form on bulletin boards or other Company property at any time without specific authority of Management. (32)

Distribution of any written or printed literature on Company premises without written authorization. (33)

Unauthorized operation of machines, tools or equipment. (34)

Soliciting or collecting of contributions for any purpose whatsoever on Company property without written authorization. (35)

* * *

FIRST OFFENSE--1 Week Layoff.
SECOND OFFENSE--Discharge.
THIRD OFFENSE--

Voluntary absence by design or intention. (12)

* * * *

FIRST OFFENSE--Warning to Discharge.
SECOND OFFENSE--Discharge.
THIRD OFFENSE--

Reporting for work under the influence of alcohol, when suffering from an alcoholic hangover, or in an unsafe condition. (18)

Refusal to obey orders of Foreman or other supervision. (15)

Refusal or failure to do job assignment. (Do the work assigned and follow instructions; any complaint may be taken up through regular channels). (16)

Possession of, or drinking of, liquor or any alcoholic beverage either on or off Company premises during shift. (17)

Threatening, intimidating, coercing, or interfering with employees or with supervision at any time. (24)

Abusive language to any employee or supervisor. (25)

Sleeping on duty. (26)

Sabotage. (27)

Taking of photographs on Company premises without permission. (28)

Using another's badge or pass, or permitting another to use your badge or pass to enter or leave Company property at any time. (29)

Imprisonment resulting in absence of 5 days or more. (37)

Harboring a disease or condition which may endanger health of others. (38)

Possession of weapons on Company premises at any time. (39)

Entering or leaving Company property at other than authorized entrances and exits, or at other than authorized times. (40)

Theft, or misappropriation of property of employees or of the Company. (41)

Reynolds Metals Company
Grand Rapids Plant
Revised Plant Rules Eff. 3/15/57

TRIAL EXHIBIT D
WARNING NOTICE

Date: Aug. 29, 1966

Name: Robert Dewey Clock No. 22521 Dept. 1200

Warning For:

- ☐ Carelessness
- ☐ Chronic Absence
- ☐ Chronic Lateness
- ☒ Absence without Excuse
- ☐ Quitting Early
- ☐ Loafing on Job
- ☐ Smoking in Prohibited Areas
- ☐ Dishonesty
- ☐ Insubordination
- ☐ Failure to Do Work Ordered
- ☐ Under Influence of Alcohol
- ☐ Damaging Co. Property
- ☐ Gambling on Premises
- ☐ Defective Work
- ☐ Leaving Workplace without Permission
- ☐ Horseplay
- ☐ Poor Housekeeping
- ☐ Failure to Obey Safety Rules
- ☐ General Conduct (Explain Below)
- ☐ Other (Explain Below)

This is First ☒ Second ☐ Third ☐ Final ☐ warning for this offense. Next offense will result in Layoff ☐ Termition ☐.

Remarks: Violation of plant rule No. 11, Absent August 28, 1965.

Signed: William G. Clifton
Union Representative
Signed: Ray E. Coll
Company Representative.

TRIAL EXHIBIT E

WARNING NOTICE

Date: Sept. 6, 1966

Name: Robert Dewey Clock No. 22521 Dept. 1200

Warning For:

- ☐ Carelessness
- ☒ Chronic Absence
- ☐ Chronic Lateness
- ☒ Absence without Excuse
- ☐ Quitting Early
- ☒ Loafing on Job
- ☐ Smoking in Prohibited Areas
- ☐ Dishonesty
- ☐ Insubordination
- ☐ Failure to Do Work Ordered
- ☐ Under Influence of Alcohol
- ☐ Damaging Co. Property
- ☐ Gambling on Premises
- ☐ Defective Work
- ☐ Leaving Workplace without Permission
- ☐ Horseplay
- ☐ Poor Housekeeping
- ☐ Failure to Obey Safety Rules
- ☐ General Conduct (Explain Below)
- ☐ Other (Explain Below)

This is First ☐ Second ☒ Third ☐ Final ☐ warning for this offense. Next offense will result in Layoff ☐ Termition ☒.

Remarks: Violation of plant rule No. 11, Absent September 4, 1966. The above employee is hereby on disciplinary layoff effected September 12-13-14, 1966.

Signed: William G. Clifton
Union Representative

Signed: G. H. Johnson
Company Representative

TRIAL EXHIBIT F

GRIEVANCE REPORT

Grievance No. 621

Department No. 1200. Date: Sept. 7, 1966.
Shift: 3-11

Nature of Grievance
Unfair Labor Practice.

On Sept. 6, 1966 Robert Dewey was given a Labor Complaint and a three day suspension for failing to report for work on Sunday Sept. 4, 1966. Plant Rule #11 absence without a reasonable excuse. The Co. is using this rule as a club in order to force the people who rightiously believe that it is against their religious & moral principles to work on Sunday. The Co. contends that this is a normal scheduled work day if so why the Special Punishment?

A man can conceivably be absent from work on any of the other six work days five or six times with no punishment what-so-ever but if one Sunday is missed he then becomes a special case and is written up at once. This is no more than discrimination against these men and the Co. can be cited under the Federal Law for Discrimination.

For these reasons we demand that the Co. withdraw all Labor Complaints against the men of Local 277 for not working on Sundays.

Mr. Dewey should not have had a Labor Complaint on the above date as the Co. did get a replacement for him in the person of Jake Zaagman who worked of his own free will even tho it was out of his classification and out of his dept.

Signed: Robert Dewey
William G. Clifton
Steward

Foreman's Comments
General Foreman's Comments 9-8-66

Mr. Dewey was scheduled to work Sunday under the provisions of the contract. He refused to find or accept a replacement. When Mr. Dewey failed to report into work Sunday, Mr. Zaagman was ask to work an additional shift due to Mr. Dewey's absence.

Signed: G. J. Johnson
General Foreman

3rd Step--9-13-66

R. Dewey refused to work as scheduled under the contract. He had previously been warned that his excuse was not acceptable. He also refused to make use of relief provided by agreement for obtaining a replacement to perform required overtime work. Grievance denied.

R. A. Lies

TRIAL EXHIBIT G

Name: Robert Dewey Clock No. 22521 Sept. 12, 1966
Die Repair

WARNING FOR

- ☐ Carelessness
- ☐ Chronic Absence
- ☐ Chronic Lateness
- ☒ Absence without Excuse
- ☐ Quitting Early
- ☐ Loafing on Job
- ☐ Smoking in Prohibited Area
- ☐ Dishonesty
- ☐ Insubordination
- ☐ Failure to Do Work Ordered
- ☐ Under Influence of Alcohol
- ☐ Damaging Co. Property
- ☐ Gambling on Premises
- ☐ Defective Work
- ☐ Leaving Workplace without Permission
- ☐ Horseplay
- ☐ Poor Housekeeping
- ☐ Failure to Obey Safety Rules
- ☐ General Conduct (Explain Below)
- ☐ Other (Explain Below)

This is First ☐ Second ☐ Third ☒ Final ☐ warning for this offense. Next offense will result in Layoff ☐ Termination ☐.

Remarks: Violation of Plant Rule No. 11—Absent Sept. 11, 1966. Discharged. A five day suspension period is specified in the contract for filing of any protest.

Signed: William G. Clifton
Union Representative
Signed Gerald H. Johnson
Company Representative

TRIAL EXHIBIT H
PROTEST REPORT
REYNOLDS METAL CO.

Grievance Number 629,
9-26-66

Nature of Grievance--

I, Robert Dewey protest the notice of suspension given to me for failing to report for work on Sunday Sept. 11, 1966 based on plant rule #11. We contend the Company is using their rule in order to force people to work on Sunday against their religious and moral principles. The Company contends this is on a normal work day, if so why the special punishment. A man can miss any one of the other 6 days in the week without receiving any punishment what so ever but not one Sunday is allowed without it becoming a special case. We feel this is a clear case of discrimination on the part of the Company. For these reasons we request the Company to withdraw the labor complaint (notice of suspension) given me for not working on Sept. 11, 1966 and restore my seniority rights.

Received Sept. 19, 1966, Personnel Dept.

Signed: Robert Dewey
Sam Sella

TRIAL EXHIBIT I

Grievances No. 621, 622 and 629
Received Jun 30 1967 Personnel Dept.

Mark L. Kahn
Arbitrator

OPINION AND AWARD
dated
June 29, 1967

ARBITRATION
between
Reynolds Metals Company
Grand Rapids, Michigan
— and —
Local No. 277
United Automobile Workers
AFL-CIO
Hearing held April 27, 1967
Grand Rapids, Michigan

For the Union
Appearances:
Jacob Webber, Int'l Repres.
Sam J. Sella, Jr., Chairman, Bargaining Committee

Witnesses:
Robert Dewey, Grievant
Hilbert Scholten, Grievant

Present:
Carlton Galor, President Local No. 277
Gerald Berghorst, Committee
William Boyer, Committee
William Groogers, Committee
Arthur J. Verburg, Pastor, Christian Reformed Church
Jamestown, Michigan

For the Company
Appearances:
William A. Coughlin, Jr., Attorney

Witness:
Robert Lies, Personnel Manager

Present:
Robert E. Jordan, Staff Asst., Labor Relations, Richmond, Va.
John Norman, General Foreman, Extrusions
Ray Call, Foreman

OPINION

This arbitration is between Reynolds Metals Company, Grand Rapids, Michigan, and Local No. 277 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. It takes place under and in accordance with the Agreement between the parties entered into on September 20, 1965, and involves three grievances:

No. 621, dated September 7, 1966, filed by Robert Dewey
No. 622, dated September 7, 1966, filed by Hilbert Scholten
No. 629, dated September 26, 1966, filed by Robert Dewey.

The issue relates to the refusal of Dewey and Scholten to perform any Sunday work, for which each man was given a three-day suspension and for which Dewey was discharged on September 12, 1966.

The parties, after failing to dispose of these three grievances in the prior steps of their Grievance Procedure, picked the undersigned to serve as

impartial arbitrator for these grievances from a panel supplied by the Federal Mediation and Conciliation Service. Notice of this appointment was sent to the undersigned on March 23, 1967.

A hearing was held in Grand Rapids on April 27, 1967. Each party had a full opportunity, during this hearing, to present evidence and argument. Subsequently, in accordance with arrangements established at the hearing, each party was accorded an opportunity to file a post-hearing brief. The record was closed as of June 12, 1967, upon the receipt of a brief from the Company. No brief was filed by the Union.

Background

The Company's plant in Grand Rapids produces aluminum billets and extrusions. Prior to and during most of 1963, the plant operated on a five-day schedule with some employees on layoff. Demand then increased, the Company started to recall laid off employees in late 1963, and during most of 1964 and 1965 the Company operated "five-plus" days per week with no employees laid off. Since late 1965, in response to still heavier demand for its products, the Company has operated on essentially a "six-plus" weekly schedule, utilizing Saturdays regularly and also requiring substantial numbers of its employees to work on most Sundays. For example, Sunday production took place on 24 of the 37 Sundays between January 1 and September 11, 1966.

The Agreement contains the following provision in Article IX:

> Section 3. All employees shall be obligated to perform all straight time and overtime

> work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent.

The above-quoted provision was first adopted by the parties in their agreement of March 15, 1960, and has since been retained unchanged. A proposal by the Union during the 1965 contract negotiations to eliminate this paragraph was not successful.

The Agreement also provides, in Article IX, that overtime work should be divided as equally as possible among employees in each job classification in each department; that if less than all of the qualified employees in a classification in a department are needed on other than a normal straight time work day, the number required will be scheduled in accordance with the "overtime chart"; and that (per Section 4 (d).)--

> If an employee scheduled to work such overtime notifies the COMPANY prior to 5:00 P.M. Friday that, for a substantial and justifiable reason, he would prefer not to work such overtime, the COMPANY will attempt to obtain a qualified replacement by offering, in accordance with the overtime chart, the work to other employees within that classification in that department who are qualified to perform the work but who had not been scheduled to work such overtime. If a qualified replacement is not obtained, the required number of employees shall be selected by the COMPANY from among the employees who were offered such overtime in the inverse order of their seniority.

On September 20, 1965, which is the date of the current Agreement, the Company addressed a letter to the chairman of the Union's Negotiating Committee that began as follows:

> At the request of the Committee, of which you are Chairman, we are clarifying the Company's position regarding the meanings of certain parts of the contract agreed to during recent contract negotiations.
>
> ARTICLE IX, Section 3 OVERTIME PROVISIONS
>
> The COMPANY will relieve an employee of the obligation of performing overtime work under this Section under the following conditions:
>
> (a) The employee furnishes a qualified replacement to perform the scheduled overtime.
>
> (b) Questions of qualification will be determined by the Foreman. * * *

The Company's Plant Rules, posted in each department and in effect since 1957, contain a list of 41 kinds of misconduct and a penalty schedule for each kind. No. 11 includes "absence from work without reasonable cause" and calls for a warning for the first offense, a one-week layoff for the second offense, and discharge for the third offense. The Plant Rules also state: "Depending upon the seriousness of the offense and other factors in the judgment of Management, the Company reserves the option of imposing a lesser penalty than that indicated."

Grievant Dewey has a seniority date of June 12, 1951, and was a Die Repairman. He refused to work

as scheduled on Sunday, November 21, 1965, on the basis of his religious beliefs, and he advised the Company at that time that he would not work on any Sundays because of those beliefs. Dewey was given a verbal warning at that time and was advised that a repetition would lead to disciplinary action under Plant Rule No. 11.

Dewey was next scheduled for Sunday work on August 7 and August 14, 1966. On each of these dates, however, he was replaced by Jake Zagman, apparently at Zagman's initiative, and Zagman was considered by the Company to be an acceptable replacement in accordance with the terms of the Letter of Interpretation dated September 20, 1965. When Dewey was scheduled to work on Sunday, August 28, 1966, however, Dewey told Zagman not to serve again as his replacement. Dewey himself refused to work on August 28 and was then given a written warning for violation of Plant Rule 11.

Dewey's next Sunday work was scheduled for September 4, 1966, and upon his refusal of this assignment (and no attempt to obtain a replacement) he was given another written warning plus a three-day disciplinary suspension. This penalty is the basis of his Grievance No. 621. Dewey was next scheduled for Sunday work on September 11, 1966, and he was discharged on the following day after refusing the assignment (and again making no effort to obtain a replacement). This discharge is the basis of his Grievance No. 629.

Grievant Scholten has a seniority date of October 24, 1950, and is a Shape Truing Machine Operator. He refused to work on Sunday, January 16, 1966, because of his religious beliefs. The Company then advised Scholten that this particular absence

would not be held against him but that this reason for any future refusal of Sunday work would not be acceptable. Scholten was next assigned to Sunday work on April 17, 1966. He again refused for religious reasons and stated that he would not work on any Sunday. He was given a written warning. Scholten nevertheless refused his next Sunday work assignment on August 14, 1966, and was then given another written warning plus a three-day disciplinary suspension. Scholten then filed Grievance No. 622.

We are confronted with the identical issue in the cases of Dewey and Scholten. Both grievants have firmly refused all Sunday work on the grounds that such work is not permitted by their religious beliefs. Both grievants have also refused to utilize the opportunity provided under the Letter of Interpretation dated September 20, 1965, to furnish (or attempt to furnish) a qualified substitute. Scholten has never accepted Sunday work at the Company. Dewey acknowledges having done some Sunday work for the Company many years ago, before his religious beliefs took their present form in or about 1961. The principal distinction between the status of the two grievants is that Scholten (as of April 27, 1967) had not been again assigned to Sunday work since his three-day penalty in August 1966. The Company does not question the sincerity of the grievants' religious convictions under which Sunday work at the Company is prescribed.

Position of the Company

The Company maintains that the religious beliefs of the grievants do not provide "a substantial and justifiable reason" for their refusal of all Sunday work. The Company emphasizes that the grievants are members of a bargaining unit covered by

a collective bargaining agreement under which all properly scheduled work assignments are compulsory; that the Company has had to assign a good deal of Sunday work since late 1965 in order to meet contractual commitments involving both government and civilian product needs; that the Union's 1965 attempt to eliminate compulsory overtime did not succeed; and that the Company has consistently refused to excuse employees from Sunday work on religious grounds.

The Company notes that on January 16, 1966, it terminated two supervisors who refused to work on Sundays, and it cites four written warnings (Dekker, Hatfield, Walthorn, Carlton), three three-day layoffs (van Haitsma, Zylstra and Wyn), and one discharge (Knight), all given in and since 1966 in accordance with the penalty schedule for violations of Rule 11, Knight's grievance protesting his discharge because of his absence from work on Sunday, August 28, 1966, was withdrawn by the grievant and the Union. The Company also cites a decision by Arbitrator Ronald W. Haughton dated June 3, 1965 (Grievance No. 439), upholding a warning notice issued to employee Zylstra because of his absence from Sunday work for religious reasons on July 26, 1966.

The Company submits that the establishment of a replacement system in September 1965 attests to the reasonableness of the Company's application of the compulsory overtime clause. The Company observes that--

> the refusal of the grievants to allow the replacement system to operate reduces the position of the grievants in this situation to one of narrow personal consideration which

cannot be condoned since the grievants are part of the work force and are subject to the terms and conditions of the Labor Agreement ...

[Company Brief, p. 12]

The Company reports that both of the instant causes have also been the subject of investigations by the U.S. Office of Federal Contract Compliance and by the Michigan Civil Rights Commission and that the conclusion of each agency is that there was no violation of the respective laws. The Company asserts that to excuse the grievants from Sunday work on religious grounds would in fact discriminate against other employees. It is the Company's conclusion, based on all of the foregoing considerations, that the grievances of Dewey and Scholten should be denied.

Position of the Union

The Union contends that there clearly exists "a substantial and justifiable reason" for excusing the grievants from Sunday work in accordance with the exception specified in Section 3 of Article IX, namely, their religious beliefs which do not permit them to work on their Sabbath day. The Union asserts that other employees have been excused from scheduled work for less substantial and less justifiable reasons, such as their desire to attend baseball games, picnics and wedding anniversaries. In fact, says the Union, it is not aware of any instances where Rule 11 has been applied except to instances involving the religious beliefs of employees.

The Union points out that on many of the Sundays for which the grievants were given a warning or penalty for refusing to work, replacements were in fact available. The Union suggests that if the Company

had wanted to work out the problem it could and should have cooperated with the Union in obtaining replacements for the grievants instead of penalizing these men for their religious beliefs.

As to the arbitration decision of Arbitrator Haughton cited by the Company, the Union points out that Mr. Haughton relied on the fact that the aggrieved employee in that case "found it possible to make adjustments and to accept Sunday overtime assignments from time to time in the past." In this case, however, Scholten has never accepted a Sunday assignment and Dewey has not worked on Sundays since his religious beliefs took their present form in 1961.

The Union suggests that the effect of the Company's interpretation and application of Article IX, Section 3, in light of the Letter of Interpretation dated September 20, 1965, is to discriminate against those employees who seek to be excused from assigned work for reasons of religion. The Union concludes that these grievances should be sustained, the penalties removed, and the grievants made whole for earnings lost because of the improper penalties imposed on them.

Discussion

Section 3 of Article IX, which had been in effect about six and one-half years when the grievances involved in this case were filed, makes overtime work compulsory when it is assigned in accordance with other provisions in Article IX unless the employee who has been assigned to the overtime work can furnish a qualified replacement. I must decide whether or not the religious beliefs of the grievants provide them with an entitlement to refuse all Sunday

work under the "substantial and justifiable" criteria of Article IX, Section 3. A corollary issue raised by their conduct is whether or not they were also entitled to refuse to attempt to obtain a qualified replacement.

My first conclusion is that the grievants were not entitled to rely upon the "substantial and justifiable reason" exception as a basis for refusing all Sunday work. The Company resorts to Sunday work assignments, for which it must pay employees at double-time rates, only when heavy customer demands appear to leave no practical alternative. The procedures for assigning such work maximize the opportunity for individual employees who prefer not to work on Sunday to avoid such work by first relying on volunteers. When these are not sufficient, the junior qualified employees (in the classification within the department) are then involuntarily assigned, but even these "draftees" are entitled to furnish qualified replacements (who need not be from within the same department). Consequently, when we look at the situation with some perspective, it is seen that an individual employee will have to work on a Sunday against his will only as an exceptional event. In my judgment, employees may not flatly refuse to work on these "exceptional" Sundays in view of their obligations under the Agreement and the Company's consistent administration of the relevant provisions.

It is worth noting, perhaps, that Article IX, Section 3, applies explicitly to "all straight time and overtime work" and not merely to overtime work. Suppose that an employee decided to join a religious organization with a Wednesday Sabbath, and that he thereafter refused to work on Wednesdays. It would be obvious, I think, that the Company could properly find this employee in violation of Rule 11;

yet, the language of the Agreement makes no distinction for this purpose between straight time and overtime work assignments.

My second conclusion is that both grievants had an obligation, under all the circumstances, to utilize the established replacement procedure in order to minimize or perhaps avoid entirely the need to confront the Company with a refusal of Sunday work. I do not question the sincerity of their conviction that it would be sinful for them to look for a replacement, but I consider it to be misconduct under the Agreement for them to have refused to do so. (Dewey, it will be recalled, accelerated his disciplinary timetable by telling Zagman not to serve as a replacement any more.)

Arbitrator Haughton, in his 1965 decision in the Zylstra case (cited earlier), appeared to rely only partly on the fact that Zylstra "has found it possible to . . . accept Sunday overtime assignments in the past." Haughton then wrote:

> . . . . In these circumstances, and recognizing that it is an established practice for Sunday overtime work to be required when necessary in modern industry, the decision on the basic question of whether or not the aggrieved, because of a religious conviction, had substantial and justifiable reason for not working must be in the negative.

On reviewing the facts of the grievances now before me, I would conclude that the question of whether or not an employee happened to accept Sunday work in the past (which Dewey did) or has always refused Sunday work (like Scholten) is not determinative of

the basic issue.[1] Of more relevance as precedent, I think, is the fact that a grievance protesting the discharge of Knight in August 1966 for refusing Sunday work on religious grounds was later withdrawn.

An important commitment arising out of one's religious convictions and obligations can provide a "substantial and justifiable reason" for excusing an employee from some particular work assignment, on a Sunday or on some other day. What I found here, however, is that the Agreement does not permit a regular and continuing refusal of all Sunday work on religious grounds. I will therefore not sustain the grievances.

AWARD

Grievances No. 621 and No. 629 (Robert Dewey) and Grievance No. 622 (Hilbert Scholten) are hereby denied.

Mark L. Kahn
Arbitrator

DATED: June 29, 1967

[1] Dewey's religious views did not take their present form, under which he feels compelled to refuse all Sunday work, until about 1961. This was after the adoption of the present compulsory overtime provision, which occurred in March 1960.

TRIAL EXHIBIT J
STATE OF MICHIGAN
GEORGE ROMNEY, Governor
CIVIL RIGHTS COMMISSION
900 Cadillac Square Building, Detroit, Michigan 48226
Telephone: 222-1810
BURTON I. GORDIN, Executive Director

September 19, 1966

Re: #1904-E4 Robert K. Dewey
-vs- Reynolds Metals Company

Mr. R. A. Lies
Personnel Manager
Reynolds Metals Company
1701 Porter, S.W.
Grand Rapids, Michigan

Dear Mr. Lies:

This is to advise you that Mr. Robert K. Dewey has filed an application for the issuance of a complaint by this Commission against Reynolds Metals Company.

Mr. Dewey states that on September 12, 1966, he was notified that his employment was being terminated as of that date for violation of Plant Rule No. 11, Absence Without Excuse. Mr. Dewey states that he had received three Warning Notices for allegedly unexcused absences on August 28, September 4, and September 11, 1966, although he had notified the company of his preference to not work on Sundays because of his religious beliefs. Mr. Dewey states that a Letter of Agreement has been developed between the Union and the company which provides that the company will find replacements or substitutes for employees who prefer not to work

overtime. Mr. Dewey states that substitutes were secured to perform his work on both Sunday, September 4, and Sunday, September 11.

Mr. Dewey believes he has been subjected to discriminatory treatment and discharged because of his religious beliefs.

This case has been assigned to Representative Delbert W. Hunt for investigation. Mr. Hunt will contact you in the near future to make an appointment to discuss this matter with you and/or your representative.

We find in many cases, however, that claims can be settled prior to investigation. If you have any suggestions of ways of settling the claim described herein prior to such investigation, we would most appreciate having you contact Mr. Hunt. Such suggestions, of course, in no way imply that the claim has merit. We solicit these suggestions because of your knowledge of the situation and because of the possibility that a solution can be proposed which will save time for all concerned.

Very truly yours,

Thomas J. Peloso, Jr.
Director of Compliance

TRIAL EXHIBIT K
STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION
900 Cadillac Square Building
Detroit, Michigan 48226
NOTICE OF DISPOSITION
Application No. 1904--EM
CLAIMANT: Robert K. Dewey
RESPONDENT: Reynolds Metals Company

SUMMARY OF FINDINGS:

The findings indicate that the claimant, despite due notice of overtime requirements by the company and the applicable Collective Bargaining Agreement provisions, continued to refuse to perform scheduled overtime work on Sundays and took the position that his right to continued employment while following his religious belief without interference was an absolute right.

The Commission has previously ruled that where the normal work week and forseeable overtime requirements are prescribed in a Collective Bargaining Agreement, that absent or (sic) intent on the part of respondent to discriminate on religious grounds, an employee is not entitled to demand any alteration in such requirement to accommodate his religious beliefs.

The investigation did not reveal any intent on the part of the respondent to discriminate on religious grounds and it is, therefore, recommended that this application for the issuance of a complaint be denied for lack of probable cause.

ORDER OF DISMISSAL

The Commission has found insufficient grounds on which to issue a Complaint and, therefore, the above Application is herewith denied. This Order of Dismissal shall automatically become effective within 15 days from the date of mailing unless the Claimant shall demand a hearing prior thereto.

BY ORDER OF THE CIVIL RIGHTS COMMISSION

By: /s/ Burton I. Gordin
Executive Director

Date: December 13, 1966

MICHIGAN CIVIL RIGHTS COMMISSION, RULES GOVERNING ORGANIZATION, PRACTICE AND PROCEDURE

RULE 7 "Any Claimant may request of the Commission a reconsideration of its refusal to issue a Complaint or any Party may request as to the terms of conciliation. Such request must be in writing, state specifically the grounds upon which it is based, and be filed within 15 days from the date of mailing of the notice of disposition of which reconsideration is requested. It shall be filed in the office of the Commission (personally or by mailing) where the application was previously filed.

"The Commission in its discretion shall grant or deny the request for reconsideration. In either event, it may schedule a hearing thereon at such time and place and before such Hearing Commissioner or Commissioners or Hearing Referee or Referees

as it may determine, and notice thereof shall be given to all Parties to the proceeding . . .".

RULE 10 (a) "Any Party or intervenor claiming to be aggrieved by a final order of the Commission, including without limitation a refusal to issue a Complaint, may appeal to the Circuit Court of the State of Michigan having jurisdiction provided by law . . .".

Dated at Detroit, Michigan and Mailed on December 14, 1966.

TRIAL EXHIBIT L
CHARGE OF DISCRIMINATION
(Under Title VII of the Civil Rights Act of 1964)

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. G1-7-1-295

Mail to Equal Employment Opportunity Commission, 1800 G Street, N.W., Washington, D.C. 20506.

ROBERT DEWEY, 901 32nd S. W., Grand Rapids Michigan 49509.

Was the discrimination because of: Religious creed.

Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Reynolds Metal Company, 1701 Porter S.W., Grand Rapids, Michigan 49509.

Have you filed this charge with a state or local government agency? Yes.

If your charge is against a company or a union, how many employees or members? Approx. 300.

The most recent date on which this discrimination took place: September 12, 1966.

Explain what unfair thing was done to you:

Employee has been an employee of Reynolds Metal Company for fifteen years. Approximately one year ago the company signed with the union representing the employee, an agreement in which the company was permitted to require overtime. The provisions of the contract read as follows:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when the employee has a substantial and justifiable reason for not working."
>
> Article IX, Sec. 3, of the Agreement between Reynolds Metal Co. and the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America UAW-AFL-CIO and Local 277.

Subsequent to signing this agreement, the company decided to require overtime on Saturday and Sunday, the.....

NOTE: See other side for beginning of explanation.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date: December 30, 1966.

Robert Dewey

Subscribed and sworn to before me this 30th day of December, 1966.

Gertrude Bos, Notary Public

Employee is a member of the Reformed Church of America, and has been converted to Christ for five years. Every Sunday he teaches Sunday School in his church. He believes that Sunday is a day to worship and serve God, and these beliefs compel him to abstain from work on Sunday.

Employee has been an employee of Reynolds Metal Company for fifteen years. Approximately one year ago the company signed with the union representing the employee, an agreement in which the company was permitted to require overtime. The provisions of the contract read as follows:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when the employee has a substantial and justifiable reason for not working."

Article IX, Sec. 3, of the Agreement between Reynolds Metal Co. and the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America UAW-AFL-CIO and Local 277.

Subsequent to signing this agreement, the company decided to require overtime on Saturday and Sunday. The weeks in which overtime on Sunday was required were not permanent but were required from time to time as the company required. During the first of these weeks, employee was on vacation. At this time, a few other employees were absent on Sunday because of religious beliefs.

The company found such a reason unacceptable in spite of the fact that the company gave a fellow worker an excused absence when the reason given was to attend a family reunion. The company also gives excused absences for health, attendance of a funeral, and other reasons.

After this first incident, the company initially declined to enforce their position, but later took the position that the employee would be absent without excuse if the employee did not obtain a substitute on his own.

Because of his religious beliefs, employee did not work on Sundays August 28, 1966, September 4, 1966 and September 11, 1966. On all these days employee did not obtain a substitute worker on his own, although employee knows that on at least one of these dates there was a substitute. On all of these dates, employee notified the company prior to the particular Sunday that he would not work on that Sunday. Because of his failure to appear at work on September 11, 1966, employee was discharged September 12, 1966.

Since the time of the discharge, employee has filed a claim, number 1904-EM with the Michigan Civil Rights Commission on September 16, 1966. The claim was decided December 13, 1966, against employee.

Employee asks the Equal Employment Opportunity Commission to find that Reynolds Metal Company discriminated against employee because of his religion because:

(1) When employee was originally hired by Reynolds Metal Company, there was no requirement forcing him to work. After employee had accumulated fifteen years seniority and the occupational benefits which accompany this seniority, employee was dismissed because of a requirement, the effect of which was to force those persons who had bona fide religious beliefs, either to violate those beliefs and work for the company or to remain steadfast to those beliefs and be dismissed. Employee believes that the policy of the statute was to protect himself and his beliefs from the pressure of his employer. If the employer can force the employee to violate his religious beliefs through company requirements which on the face of the requirements seem to affect all, yet in effect, forces those with bona fide religious beliefs to suffer hardships, the purpose of the act is defeated.

(2) The number of employees who refuse to work on Sunday because of bona fide religious beliefs are very small in comparison to the total working force, and would represent an insignificant amount of inconvenience to the company in order to permit employee to practice his religious beliefs.

(3) The company allows excused absences for health, family reunions, and other reasons. Employee maintains first, that observing his spiritual convictions to God is a substantially better reason for an excused absence than a family reunion. Secondly, employee maintains that spiritual health

is just as important as physical health and that the difficulty in policing excused absences for religion is not any greater than policing bona fide sick days.

TRIAL EXHIBIT M
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20506

January 5, 1968

In Reply Refer To:
Case No. CL 7-1-15
Reynolds Metals Company
Grand Rapids, Michigan

Mr. Robert A. Lies
Personnel Manager
Reynolds Metals Company
1701 Porter Street, S.W.
Grand Rapids, Michigan

Dear Mr. Lies:

After investigation of charges, the Equal Employment Opportunity Commission has determined there is reasonable cause to believe that the above named Respondent has engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964. A copy of the Commission Decision is enclosed.

As soon as possible a conciliator will contact the parties to discuss means of correcting the discrimination involved and ways of avoiding it in the future. The conciliator will propose a written conciliation agreement for this purpose. If an agreement is signed by the parties, it will be submitted to the Commission for its approval. If the Commission is unsuccessful in its efforts to secure

voluntary compliance, it must so notify the Charging Party and advise him of his right to seek relief in a Federal Court.

Under the Statute and the Regulations of the Commission, nothing said or done during or as a result of conciliation may be made public by the Commission or used as evidence in a subsequent proceeding without the written consent of the parties.

We are hopeful that you will cooperate with us in achieving the objectives of the Civil Rights Act and that we will be able to resolve the matter quickly and satisfactorily to all concerned.

Sincerely yours,

Robert L. Randolph (Acting)
Director of Compliance

Received: January 10, 1968
Personnel Dept.

OPINION
(Filed June 6, 1969)

This is an action arising under Title VII of the Civil Rights Act of 1964, 42 USC §2000 (e), which provides, among other things, for relief against religious discrimination in employment. The parties have stipulated to the facts, the most pertinent of which are set forth below.

Plaintiff, Robert Dewey, was employed by defendant at its Wyoming, Michigan plant on June 14, 1951, and held various jobs until he became a die repairman, which is the job he held at the time of his discharge on September 12, 1966.

Defendant's Wyoming facility is a "job type" plant which produces aluminum extrusions and billets on an order basis. Before 1964 the plant operated on a five-day weekly schedule. Because of increased business, during 1964 and 1965 the plant operated on a "five plus" days weekly schedule. This increased to "six plus" days by 1966, with numerous Sunday work schedules.

Plaintiff was a member in good standing of the U.A.W. Union, Local 277, which represents the production and maintenance employees of defendant's plant.

Before the 1960 Labor Agreement, overtime at the plant was performed on a voluntary basis, and under such circumstances scheduling of production was made impossible on certain overtime days. In 1960, and to the present time, the agreements have included a section giving defendant the right to set overtime schedules and make it compulsory for the employees to work such schedules unless they have a sbustantial and justifiable reason for not doing so. This section in the 1965 Labor Agreement is Article IX, Section 3:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent."

The agreement also provides, in Article IX, Section 4, that overtime work shall be divided as equally as possible. If fewer than all qualified employees

are needed, the number required is to be scheduled with the overtime chart, and if more employees are needed, they are assigned in the inverse order of their seniority.

In response to a Union objection to the compulsory overtime clause, defendant on September 20, 1965, issued an interpretation of the Labor Agreement which said in effect that any employee assigned to overtime could be relieved from that assignment by arranging for another qualified employee to replace him. This system has been utilized extensively.

Since December of 1961, plaintiff has been a member of the Faith Reformed Church, affiliated with the Reformed Church of America. After joining this church plaintiff never volunteered for Sunday overtime work, although he did volunteer for other days.

Plaintiff was scheduled to work overtime on Sunday, November 21, 1965, pursuant to the compulsory overtime provisions of the Labor Agreement. He refused to work because of his religious beliefs; he was given a verbal warning; and he was advised of the necessity of a seven-day operation and that a repetition of his conduct would lead to a disciplinary action under Plant Rule 11. This rule prohibits "absence from work without reasonable cause," and provides a three-offense progression of punishment, with discharge for the third offense.

On the next five Sundays which plaintiff was required to work, between January and August 1966, he instead obtained qualified replacements in the manner described, supra. But on August 28, 1966, when again required to work on Sunday, plaintiff

refused to work because of his religious beliefs and refused because of his religious beliefs to obtain a replacement. He told Jake Zagman, a fellow employee who had been serving as his replacement, that he would no longer ask Jake to replace him. Plaintiff was given a written warning of violation of Plant Rule 11.

There is no dispute that these religious beliefs of plaintiff are sincere. These beliefs were expressed by plaintiff to the defendant before the first time he refused to obtain a qualified replacement. Plaintiff honestly believes, as a part of his religion, that he should not work on Sunday, and that he also should not induce anyone else to work on Sunday.

Consequently, on the next Sunday which plaintiff was required to work, September 4, 1966, he refused to work or to obtain a replacement. He was given a written warning and a disciplinary layoff of three days. Plaintiff again refused to work on Sunday, September 11, 1966, and was discharged for violation of Plant Rule 11.

On all the above-mentioned Sundays there were several qualified die repairmen available to work, although defendant states that two of these men could not be compelled to accept such an overtime assignment, since it was outside their job classification.

Before plaintiff's discharge, defendant had taken disciplinary action as to a number of other employees who refused overtime work assignments on Sunday because of their religious beliefs, as well as disciplinary action against employees who refused overtime on days other than Sunday.

Plaintiff filed a grievance upon his discharge, but his grievance was denied at every step of the procedure, including arbitration. The arbitrator considered only the contract, and neither the Civil Rights Act nor the Constitution was before him. Plaintiff then proceeded to the Michigan Civil Rights Commission, which denied his complaint due to insufficient grounds. Plaintiff then filed a charge with the Equal Employment Opportunity Commission, which issued a letter to defendant stating that the Commission had determined that there was reasonable cause to believe that defendant had engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964.

This action was brought upon failure of conciliation efforts. In November of 1968, this court denied defendant's motion to dismiss, 291 F. Supp. 786.

These are the facts that have been established. Before stating the law and applying it to these facts, it is well to note the facts which have not been brought before the court. There is no evidence that defendant would suffer any hardship should plaintiff prevail in this case. There is no evidence concerning what the effects would be of an accommodation by defendant to the religious beliefs of plaintiff. Could defendant continue to operate on Sunday? Would production be affected? These questions, and others like them, remain unanswered even though the parties have been given ample opportunity to present evidence concerning facts which were not possible to stipulate.

Because an application of Title VII of the Civil Rights Act of 1964, 42 USC §2000 (e) will permit the court to decide the case, it is not necessary to

reach the question of whether plaintiff's constitutional rights have been violated.

Section 703 (a) (1) of the Act, 42 USC §2000 (e)-2 (a) (1), provides:

> "It shall be an unlawful employment practice for an employer--
>
> (1) to . . . discharge any individual . . . because of such individual's . . . religion . . ."

The Act makes exception to this rule only in those instances where religion is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 USC §2000 (e)-2 (e). That exception has not been alleged, and clearly does not apply to the manufacture of aluminum extrusions.

To further the purposes of the Act, the Equal Employment Opportunity Commission was formed. 42 USC §2000 (e)-4. The Commission was given power not only to aid the enforcement of the Act, but also to promulgate regulations consistent with the provisions and purposes of the Act. 42 USC §2000 (e)-12 (a). Regulation Section 1605.1 is directly applicable to this case:

> "Section 1605.1 Observance of Sabbath and other religious holidays.--(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays

during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703 (a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

Great weight should be given to this regulation, as the Supreme Court emphasized in Udall v. Tallman, 380 U.S. 1, 16 (1965):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Comm'n. v. Aragon, 329 US 143, 153, 91 L ed 136, 145, 67 SCt 245. See also, e.g., Gray v. Powell, 314 US 402, 86 L ed, 301, 62 S Ct 326; Universal Battery Co. v. United States, 281 US 580, 583, 74 L ed 1051, 4054, 50 S Ct 422. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'." Power Reactor Co. v. International Union of Electrical, etc. 367 US 396, 408, 6 L ed 2d 924, 932, 81 S Ct 1529.

In considering the law to be applied, the effect of the labor-management agreement must be determined. The agreement prescribes a certain procedure for assignment of overtime and for disciplinary discharge. If the procedures provided are lawful, defendant would prevail. If they are unlawful, the fact that it is a labor-management agreement will not validate the procedures. An agreement which violates a provision of the federal constitution or of a constitutional federal statute, or which cannot be performed without violating such a provision,

is illegal and void. Ewert v. Bluejacket, 259 U.S. 129, 138 (1922); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902); 17 Am. Jur. 2d, Contracts §165 (1964).

The issue is thus not changed by the existence of a contract. If the procedures used are discriminatory, the plaintiff is entitled to relief, notwithstanding the fact that the contract authorized the procedures.

In applying the law to the facts in this case, we are concerned with the answer to one question: is the enforcement, by discharge, of compulsory overtime on Sunday discriminatory when, solely for religious reasons, the person discharged refuses to work on Sunday or to obtain a qualified replacement?

The defendant argues that discrimination requires a rule which applies differently to different groups, and that the compulsory overtime provision applies equally to all employees. This argument is invalid, because it is entirely possible that while a rule may apply equally to all employees, it does not have an equal impact on them. The court should look beyond the fact of the rule to determine whether it is discriminatory. See, in another context, Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich. 1968).

Rules having uniform application but a discriminatory effect against an individual's religion have been struck down before. Sherbert v. Verner, 374 U.S. 398 (1963), is probably the leading case in this regard. In Sherbert the plaintiff was denied unemployment compensation benefits because she

refused to work on Saturday because of her religion, and was therefore "unavailable for work." The law applied equally to all, but its impact was discriminatory as to Seventh Day Adventists, such as the plaintiff. In rejecting an argument similar to that made by the defendant in this case that the rule applies equally to all, the Supreme Court, through Mr. Justice Brennan, stated at pp. 403 and 404:

> "In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '(i)f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' Braunfeld v. Brown, 366 U.S. 599, 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable." (Emphasis supplied.)

The facts of Sherbert are similar to a recent Michigan case, Swenson v. Employment Security Commission, 340 Mich. 430 (1954). Again a provision which was applied equally had a significant impact only on Seventh Day Adventists. The application of the provision was therefore struck down.

A final example of the fallacy of defendant's argument is West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943). All school children in West Virginia were required to salute the flag, a rule which on its face is not discriminatory. But saluting the flag was forbidden by the religious beliefs of some of the students. The Supreme Court declared such a rule to be unconstitutional.

In each of these cases, as in the case at bar, the uniform application of a rule or requirement was struck down because its effect, its impact, was discriminatory.

The compulsory overtime rule of defendant, coupled with the option to obtain a qualified replacement, is not discriminatory on its face, but this is only the first step. Is the rule discriminatory in its impact? To answer the question it must first be determined what "discriminatory" means. Two definitions in the religious context are suggested, one by Sherbert v. Verner, supra, and one by the Equal Employment Opportunity Commission guidelines, also discussed supra. The standards suggested by these definitions will be applied to the case at bar.

In relation to Sherbert, one might question its relevance, since in that case there was "state action," while in the instant case there is only private action. That distinction would be important if this opinion were dealing with whether defendant's overtime rule is unconstitutional. But the issue before the court is whether the defendant has violated a federal statute--a statute which restricts the activities of private employers and does not require "state action." The importance of Sherbert to this analysis is not

its holding on constitutionality, but its definition of discrimination -- a definition which is equally valid whether employed to measure private or state action.

The religious discrimination in Sherbert is succinctly defined at 374 U.S. 404:

> "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning of one of the precepts of her religion to accept work on the other hand."

Thus, a rule which forces a person to choose between his religion and compensation benefits is penalizing him solely because of his religion.

Applied to this case, plaintiff has been forced to choose between his religion and his job. Such a choice limits plaintiff's free exercise of his religion, and is thereby discriminatory in its effect. Applying the principles of Sherbert, the rule of defendant should not be enforced against plaintiff.

It is not necessary to rest the decision entirely on the Sherbert doctrine, however. The guidelines of the Equal Employment Opportunity Commission make it very clear what duties vis-a-vis religious beliefs are imposed upon any employer. Those guidelines are a very reasonable interpretation of the statute, and are hereby adopted as defining the requirement of the statute that an employer not discriminate on the basis of religion.

The test set forth is a twofold one: (1) the employer must make reasonable accommodations to the religious needs of its employees; (2) unless such accommodation will cause undue hardship on the conduct of the employer's business.

The evidence does not establish that a reasonable accommodation to plaintiff's religious beliefs was made by defendant. When considering plaintiff's beliefs, it must be remembered that a fundamental part of them was that plaintiff could not ask anyone else to work on Sunday, because that would be as much a sin as working himself on Sunday. There is no dispute as to the sincerity of this belief.

Requiring the employee to obtain a qualified replacement may be some accommodation to those who do not approve of Sunday work, but it is no accommodation whatsoever to those who believe, as plaintiff does, that it is a sin to induce another to commit the sin of working on Sunday. As to this sincere religious belief of plaintiff, defendant has made no accommodation.

Moving to the second half of the Equal Employment Opportunity Commission test, the defendant has not demonstrated any undue hardship. As stated earlier, full opportunity was given for any and all relevant facts to be presented. Yet the only factor tending to show hardship was that ten years ago there was some difficulty scheduling production on Sunday. This is not the type of hardship envisioned by the guidelines:

> "Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualification during the period of absence of the Sabbath observer."

Dewey's case is just the opposite. There were always several available employees who could perform his work.

The other facts cited to show hardship by defendant are not part of the stipulated facts, and are not properly before the court.

Defendant alludes to the possibility that this exception would open the door to other exceptions not based on religion. This is pure speculation which is not supported by logic. Sherbert, supra, 374 U.S. at 407. Other exceptions are not authorized, indeed mandated, by federal law. There is no reason why an accommodation cannot be made relative to religious beliefs, and limited thereto.

Thus plaintiff prevails under both definitions of discrimination. The overtime procedures of defendant, as applied, violated the Civil Rights Act of 1964.

The fashioning of a remedy presents a serious problem, because a reasonable accommodation is better worked out by agreement of the parties than by fiat of the court. For this reason, the only affirmative relief which will be awarded at this time is that plaintiff be returned to work, with back pay from August 1, 1967.[1]

As to further accommodations which should be made in accordance with this opinion, the parties are asked to reach a solution acceptable to all concerned. Such a solution might include the defendant's

[1] The guidelines became effective July 10, 1967. Before the defendant was not on notice as to the meaning of the statute. But in a reasonable time after the effective date an accommodation should have been worked out. August 1, 1967 is such a time.

obtaining qualified substitutes or a shared overtime type of arrangement whereby the people who could not work Sundays would work overtime on other days of the week.

These are merely suggestions. The parties know which types of accommodations are best suited to their particular needs. It is also suggested that the union be a party to negotiations concerning an acceptable change in the contract, so that the contract will conform to the law.

The court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders are necessary to insure that the religion of defendant's employees is properly respected and fairly accommodated.

IT IS SO ORDERED.

Dated: June 6, 1969.

NOEL P. FOX
District Judge

OPINION ON MOTIONS FOR ENTRY OF JUDGMENT AND STAY OF JUDGMENT
(Filed July 25, 1969)

The parties to this suit are before the court for entry of judgment. The court's opinion ordered plaintiff to be reinstated, with back pay and full seniority, in his job with defendant.

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, defendant employer has moved

for an order staying enforcement of this judgment pending disposition of defendant's appeal to the United States Court of Appeals for the Sixth Circuit, and for fixing an amount of a supersedeas bond required of defendant.

1. Stay of Money Judgment.

In support of its motion, defendant first characterizes the relief granted in this case as "essentially a money judgment." Defendant then claims a stay of such a judgment as a matter of right, if accompanied by giving a supersedeas bond, pursuant to Rules 62 (d) and 73 (d) of the Federal Rules of Civil Procedure. Contrary to defendant's characterization, this remedy obviously involves much more than a money judgment. Reinstatement of Mr. Dewey is to be ordered, and his rights enforced by a permanent injunction. Authority for such a remedy is provided in the statute as follows:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement * * *." 42 USCA §2000e-5 (g).

The court found defendant in violation of the Act, and will proceed to fashion an effective remedy. See pages 8-11 of the court's opinion with respect to defendant's unlawful practices.

Defendant is entitled, however, to a stay of the money judgment for back pay, and this is so ordered.

II. Stay of Reinstatement.

Defendant is clearly not entitled to a stay of an injunction or injunctive type remedies as a matter of right. Rule 62 (d) provides for stay of judgment and supersedeas bond pending appeal "subject to exceptions contained in subdivision (a) of this rule." That subdivision in turn refers to subdivision (c) for the particular rule on injunctions. This rule vests discretion in the court, sitting in equity, to stay an injunction pending appeal under such conditions it deems proper for protection of the rights of the adverse party. The court will therefore consider defendant's motion as addressed to its sound discretion, and will examine the remainder of its contentions in the light of insuring justice to the parties to this lawsuit.

Defendant urges the court to consider four factors in deciding whether to stay reinstatement: (1) whether defendant has made a strong showing that it is likely to succeed on the merits of the appeal; (2) whether defendant will suffer irreparable injury if no stay is granted; (3) whether a stay would substantially harm plaintiff; and (4) the public interest. Each of these points was, in identical or similar form, argued by the defendant in the trial of this case. Each was carefully considered at that time, and disposed of in the court's opinion.

As to point (1), defendant at this hearing sought merely to reargue its case. No new material was presented to the court. Defendant's former arguments do not, in this court's view, amount to a strong showing of success on appeal.

Point (2) was also, in substance, disposed of by the court's opinion in this case. The court found

that defendant would suffer no "undue hardship," under the Equal Employment Opportunity Commission guidelines, by accommodating the religious beliefs of Mr. Dewey. The present contention that reinstatement will "irreparably harm" defendant can fare no better. For purposes of this motion, "undue hardship," and "irreparable harm" can be equated. Defendant presented no evidence of the former at trial, and the affidavit now submitted does not suffice to convince the court of the latter. Defendant's fears of injury continue to be anticipatory and based solely on speculation. The plant is not working overtime now and has not been for over eight months. Defendant's overtime schedule is entirely in the control of management. In addition, Mr. Dewey is not exempt from all overtime work. If overtime problems develop, the court has retained jurisdiction of this matter and its remedy is flexible. Accordingly, there is no hardship whatsoever to defendant in the immediate reinstatement of Mr. Dewey.

Answering point (3), the court is convinced that the only party to be irreparably harmed by a stay of this judgment would be plaintiff. Although he still has a source of income, the record shows that he is not making as much as he would were he reinstated with defendant. Occurring in one of the most inflationary periods in recent history, any wage loss involves added hardship. A stay would, in addition, threaten the skills of a die repairman. If such a skilled worker is kept from his trade, changes in modern technology lead rapidly to obsolescence of knowledge. Plaintiff also faces considerable hardship in the awesome task a person of his means faces when litigating against the corporate resources of a defendant such as Reynolds. A stay would further amplify the effective inequality

of these parties. For these reasons, a stay would irreparably harm the plaintiff.

Defendant's final point concerns the public interest. Defendant foresees grave consequences to its labor bargaining position as a result of reinstating plaintiff. It argues that, because of these predicted consequences, the public interest coincides with that of the corporation. In essence, its position is that avoiding indirect impact upon a large corporation is more consistent with public values than enforcing the constitutional rights of the individual before this court. The heart of this position is nothing more than institutional intransigence.

Defendant's position, framed as above, highlights one of the most important aspects of this case: the relationship of the individual to the overwhelming institutions of modern society. It is true that the corporation and other institutional forms are to a large degree responsible for the current prosperity of the United States. Institutions, however, often grow unsensitive to the human beings they encompass. Government itself has grown overwhelming. But we must not lose sight of the paramount rights of free individuals. Protection of these inalienable rights has been the cornerstone of national policy since the birth of this nation. The Declaration of Independence and the Fourteenth Amendment deal with the inalienable rights of individuals, not institutions. They reflect the basic theme that government and its organs are constituted by men to secure these rights to individual human beings. Congress had this in mind when it enacted Title VII of the Civil Rights Act in 1964:

> "We believe in the inherent dignity of man. He is born with certain inalienable

> rights. His uniqueness is such that we refuse to treat him as if his rights and well being are bargainable." 2 U.S. Cong. Adm. News '64, at page 2517.

One of these inalienable rights is freedom of religion. The First and Fourteenth Amendments to the Constitution and the Civil Rights Act look to securing this right to a single human being.

Following this clear principle, this court believes the public interest in this case to be best served by enforcing the constitutional rights of plaintiff. This is a classic case in which the government of the United States is called upon to secure the rights of a single individual. Defendant's motion to stay reinstatement is hereby denied.

The court will retain jurisdiction of this matter to insure continued protection of plaintiff's rights and provide the flexibility of an open ended remedy should a significant change of circumstances occur, especially with respect to defendant Reynolds. The court is certain that all parties involved can approach this case with the kind of reasonableness that reasonable men can bring to the management of institutions in the economic structure, and will use every effort to reach and maintain an accommodation within the framework of this remedial scheme. It will, however, be present to mediate any disputes affecting matters covered by its decree in this case, and, if necessary to issue additional orders to protect all concerned.

It should be made clear to the parties that the decree and any further action the court may take thereunder extends to individual officers and employees of defendant Reynolds. If necessary, to

insure justice, the union and its officers may also be made a party.

The court believes this form of remedy necessary and appropriate to insure justice in this action. It is within the inherent equity power of District Courts to fashion effective remedies to protect federal rights. Griffin v. School Bd. of Prince Edward County, 377 U.S. 218, 12 L.Ed.2d 256, 84 S.Ct. 1226 (1964). The Supreme Court has encouraged imagination and flexibility in providing remedies to make effective the Congressional purpose:

> "It is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded. And it is also well settled that where legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." J. I. Case Co. v. Borak, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555 (1964).

It is to fulfill this duty that the relief in this case is granted.

Engaging in Unlawful Employment Practices
42 USCA §2000e-5 (g).

Defendant argues that, in order to be subject to injunctive relief under 42 USCA §2000e-5 (g), supra, page 2, the court must find specific intent or purpose to discriminate against Mr. Dewey. This is not what the statute requires, either for the substantive violation or the imposition of injunctive relief. Defendant's interpreation is

consistent with neither the language nor purpose of the statute. Defendant has "intentionally engaged" and plans to continue to engage in practices which had the effect of the discrimination the Act forbids:

> "It shall be an unlawful employment practice for an employer:--
> (1) to . . . discharge any individual . . . because of such individual's . . . religion . . ." 42 USCA §2000e-2 (a) (1).

It intentionally and purposely discharged Mr. Dewey for failure to work on Sundays or find a replacement, and would continue to do so if this relief is not granted. By this action, defendant has intentionally engaged in an unlawful employment practice within the meaning of the above provision. Furthermore, defendant's reading of the statute would serve to foreclose effective remedies for violation of this important statute. Congress intended to prevent discrimination when it passed this Act. It must also have intended to provide effective remedies to secure protection under its provisions. Defendant's discharge of plaintiff was found to be discriminatory, and as such, must be subject to the full impact of remedies Congress has chosen to effect its purpose.

Defendant also urges that a "good faith" violation of Mr. Dewey's rights does not render it liable to relief under 42 USCA §2000-5 (g). Defendant cites Richards v. Griffith Rubber Mills, --F. Supp--(D.C. Oreg. 1969) as authority for this contention. This court feels that it must reject the rule adopted by the Richards court. The cases relied on there as basis for a "good faith" exception dealt with governmental and official immunity, and

should not be extended to provide an insulation for private activities based on private contracts. Dodd v. Spokane County, 393 F. 2d 330 (9th Cir. 1968); Pierson v. Ray, 386 U.S. 547 (1967). Such a rule would, for reasons previously mentioned, effectively emaciate Title VII.

Dated: July 25, 1969.

/s/ Noel P. Fox
District Judge

JUDGMENT GRANTING PERMANENT INJUNCTION, AND REINSTATEMENT, CREDIT FOR SENIORITY AND FRINGE BENEFITS, AND BACK PAY
(Filed July 25, 1969)

At a session of said Court, held in the Federal Building in the City of Grand Rapids, Michigan, on the 25th day of July, 1969.

PRESENT: Hon. NOEL P. FOX
District Judge

THIS CAUSE having come on for final hearing and the issues therein having been tried before the Court without a Jury and the evidence of all the parties hereto having been heard, and the Court having duly made findings of fact and conclusions of law in its Opinion rendered on the 6th day of June, 1969 in accordance with Rule 52 (a) of the Rules of Civil Procedure,

NOW THEREFORE, on this 25th day of July, 1969, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the Defendant, Reynolds Metals Company, is ordered to reinstate the plaintiff, Robert Kenneth Dewey, forthwith, to the job classification he held at the date of his discharge, September 12, 1966, and that Plaintiff be reinstated with full seniority that would have accrued and inured to his benefit if he had not been discharged. FURTHER, that the Plaintiff be made whole upon reinstatement by receiving full credit for all fringe benefits that would have accrued and inured to his benefit if he had not been discharged.

2. The Defendant, Reynolds Metals Company, its employees, agents, servants, attorneys, and privies, and each of them are hereby permanently enjoined and restrained from requiring the Plaintiff, Robert Kenneth Dewey, to perform work for the Defendant on Sundays.

3. The injunctive relief provided in Paragraph 1 and 2 of the Judgment is granted in accordance with and pursuant to Title VII of the Civil Rights Act of 1964, Section 706 (5) (g), 42 USC Section 2000e-5 (g), and Rule 65 (d) of the Rules of Civil Procedure for the United States District Courts, for the following reasons:

(a) In discharging Plaintiff, Defendant violated Title VII of the Civil Rights Act of 1964 in discriminating against Plaintiff because of Plaintiff's religion.

(b) In assigning Sunday overtime work to Plaintiff, Defendant failed to reasonably accommodate the religious needs of Plaintiff and Defendant has not demonstrated that undue hardship on the conduct of Defendant's business would result from accommodating

Plaintiff's religious beliefs concerning his working on Sunday and concerning his inducing another person to work on Sundays.

(c) Reinstatement is a remedy specifically permitted by the Act and is necessary to avoid irreparable harm to the Plaintiff and such remedy will not cause undue hardship on the conduct of the Employer's business.

4. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff recover from the Defendant back pay. Said Judgment for back pay shall relate to a period of time from August 1, 1967, through and including the date of reinstatement. Said amount is determined to be $7,286.92 for that period of time from August 1, 1967, through June 6, 1969. Upon reinstatement of the Plaintiff, there shall be added to this amount, an amount which represents the Plaintiff's lost wages from June 6, 1969, to the date of reinstatement. Said amount shall be determined by subtracting the Plaintiff's actual income earned during said period of time from an income average of the income earned by the two employees in the die repair classification, one whose seniority is immediately senior to the Plaintiff, and one whose seniority is immediately junior to the Plaintiff for said period of time. In determining said income average, no income earned on Sundays shall be included in arriving at said average.

5. The Court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders are necessary to insure that the religion of Defendant's employees is properly respected and fairly accommodated; and for the further purpose

of providing the parties a forum in which to seek recourse should circumstances change with respect to the effect of reasonable accommodation of Plaintiff's religious beliefs upon the conduct of the Employer's production schedules and Management-Labor relations.

The reasons for retaining jurisdiction and for the injunctive relief are set out in the Court's opinion dated June 6, 1969 as follows:

> "Moving to the second half of the Equal Employment Opportunity Commission test, the Defendant has not demonstrated any undue hardship. As stated earlier, full opportunity was given for any and all relevant facts to be presented. Yet the only factor tending to show hardship was that ten years ago there was some difficulty scheduling production on Sunday. This is not the type of hardship envisioned by the guidelines:
>
> > 'Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualification during the period of absence of the Sabbath observer.'
>
> "Dewey's case is just the opposite. There were always several available employees who could perform his work.
>
> "The other facts cited to show hardship by Defendant are not part of the stipulated facts, and are not properly before the Court.

"Defendant alludes to the possibility that this exception would open the door to other exceptions not based on religion. This is pure speculation which is not supported by logic. Sherbert, supra, 374 U.S. at 407. Other exceptions are not authorized, indeed mandated, by federal law. There is no reason why an accommodation cannot be made relative to religious beliefs, and limited thereto.

"Thus plaintiff prevails under both definitions of discrimination. The overtime procedures of defendant, as applied, violated the Civil Rights Act of 1964.

"The fashioning of a remedy presents a serious problem, because a reasonable accommodation is better worked out by agreement of the parties than by fiat of the court. For this reason, the only affirmative relief which will be awarded at this time is that plaintiff be returned to work, with back pay from August 1, 1967.[1]

"As to further accommodations which should be made in accordance with this opinion, the parties are asked to reach a solution acceptable to all concerned. Such a solution might include the defendant's obtaining qualified substitutes or a shared overtime type of arrangement whereby the people who could not

[1] "The guidelines became effective July 10, 1967. Before then defendant was not on notice as to the meaning of the statute. But in a reasonable time after the effective date an accommodation should have been worked out August 1, 1967 is such a time."

work Sundays would work overtime on other days of the week.

"These are merely suggestions. The parties know which types of accommodations are best suited to their particular needs. It is also suggested that the union be a party to negotiations concerning an acceptable change in the contract, so that the contract will conform to the law.

"The court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders are necessary to insure that the religion of defendant's employees is properly respected and fairly accommodated."

6. IT IS FURTHER ORDERED THAT enforcement of this Judgment shall be stayed for ten (10) days after entry of this Judgment.

NOEL P. FOX
District Judge

ORDER STAYING EXECUTION IN PART
(Filed July 25, 1969)

At a session of said Court, held in the Federal Building in the City of Grand Rapids, Michigan, on the 25th day of July, 1969.

PRESENT: Hon. NOEL P. FOX, District Judge

THIS CAUSE having come on for hearing on the Motion of Defendant for a stay of execution of the Judgment entered in the above-entitled cause on

the 25th day of July, 1969, pending Defendant's appeal of said Judgment, counsel for Plaintiff and Defendant present, and the Court being advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that upon the timely filing of Notice of Appeal by the Defendant, and upon the filing of a supersedeas bond in the amount of $15,000.00, that execution on that portion of the Judgment hereinbefore entered, and specifically Paragraph 4, awarding damages for back pay is hereby stayed pending a final disposition of this cause in appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that execution upon the injunctive relief granted in Paragraphs numbered 1 and 2 of the Judgment hereinbefore entered SHALL NOT be stayed after the expiration of ten (10) days from the date said Judgment was entered for the following reasons:

1. It is the finding of the Court that if the Plaintiff is not reinstated promptly, he will suffer irreparable harm inasmuch as he is a skilled tradesman in an industry that is changing. If the Plaintiff were required to await final disposition of this cause, his skills would become obsolete and unmarketable.

2. It is the further finding of the Court that the Defendant will suffer no irreparable harm or undue hardship by reinstating the Plaintiff.

3. The Court has expressly retained jurisdiction of this cause so that, if circumstances change and the hardships which the Defendant anticipates, become real instead of speculative, Defendant may seek further relief from this Court at such time.

THIS ORDER is granted in accordance with Rule 62 (a), 62 (c) and 62 (d) of the Rules of Civil Procedure for United States District Courts and is in accordance with the United States Supreme Court's mandate that the District Court's exercise flexibility and imagination in shaping remedies and providing relief under the Civil Rights Act of 1964, Pub. L. 88-352, Title VII, Section 706, July 2, 1964, 78 Stat 259, 42 USC Section 2000e-s.

NOEL P. FOX
District Judge

TRANSCRIPT OF PROCEEDINGS
(Filed August 1, 1969)

EXCERPT from proceedings had in the above entitled cause before the Honorable NOEL P. FOX, on the 16th day of July, 1969, at Grand Rapids, Michigan.

APPEARANCES:

MESSRS: VANDER VEEN, FREIHOFER & COOK,
By Donald F. Oosterhouse, Esq.,
and Peter R. Tolley, Esq.,
Appearing for Plaintiff

MESSRS: CROSS, WROCK, MILLER & VIESON,
By William A. Coughlin, Jr.,
Esq., Appearing for Defendant.

THE COURT: This case did not rest entirely upon the Sherbert doctrine. An important aspect of the predicate of the case was the guidelines of

the Equal Employment Opportunity Commission, which were adopted pursuant to Congressionally delegated authority. Such guidelines, adopted by an implementing or enforcing agency, are to be given consideration in the interpretation and application of the law. Accordingly, this court accepted these guidelines and applied them in this case.

The undue hardship mentioned above and the irreparable harm defendant now urges as grounds for a stay of judgment are equated. At the time of the decision in this case, I found that the employer had not demonstrated undue hardship; I likewise find at this time that no irreparable harm would result by not staying this judgment.

The uniquely skilled character of the die repairman is evidenced by the ratio of die repairmen to the total employment of Reynolds Metals in this plant. It is a skilled trade that by lack of use can become obsolete. I know something about die repair job classification from first hand observation with the War Labor Board, Wage Stabilization Branch, in connection with establishing wage brackets and job classifications in specific industries, mediation and decision in disputes and individual grievances handled by that office and the United States Conciliation-Mediation Service. I also served as a member of the State Labor Mediation Board and as Chairman of that Board.

From that experience it is my considered judgment that the party who would endure irreparable harm in this case would be Mr. Dewey. Nothing in the defendant's affidavit, which, again, was not presented with opportunity for cross-examination at the trial itself, is sufficient to alter the findings of

the court that Reynolds failed to establish sufficient basis for undue hardship under the Equal Employment Opportunity Commission guidelines.

I do believe that the money judgment involved should, in justice, be stayed. However, I see no hardship whatsoever in the immediate reinstatement of Mr. Dewey. Reynolds' work overtime schedule is within the complete control of management. Mr. Dewey is not necessarily exempt from overtime work. He can do so by assignment during the pendency of this action on any days other than Sunday. If the plant is operating seven days a week, it will probably be operating on more than one shift. They may have additional overtime arrangements that can be worked out. These are practical matters that I know from experience can be worked out without causing the catastrophies which are predicted by the defendant.

I am sure that the company and the union can approach this case with the kind of reasonableness that reasonable men can bring to the management of the affairs of institutions in the economic structure.

There is one obvious lesson in a case such as this. We must not forget that we are living in an age of overpowering institutions. One need only look to the trend toward consolidation of corporate wealth, to the strength of modern unions and the extent of organization needed for the functioning of space-age technology to be convinced of the impact of modern institutions.

In this particular case, we deal with the corporation, the union, and the individual's relation to these institutions. The Constitution of the United States and the Declaration of Independence look to

the individual, the human being. They talk about inalienable rights of human beings, not institutions. They reflect the basic theme that government is constituted among men to secure these inalienable rights. And it is in these very fountainheads that we find the reason why I am sitting here as a judge in a Federal Court, and why the Congress and other branches of government exist; to secure basically, first and fundamentally, the inalienable rights of a human being.

One of these inalienable rights is freedom of religion. The First and Fourteenth Amendments to the Constitution and the Civil Rights Act look to securing to the individual--a human being created in the image and likeness of God--this inalienable right, which was declared national policy at the birth of this nation.

This is a classical case in which the government of the United States is called upon to secure the inalienable right of a single human being. It is therefore the judgment of this court that if this judgment were stayed, in light of all that is before the court at the present time, the only one to suffer irreparable harm would be the single individual who stands before this court.

* * *

REPORTER'S CERTIFICATE

I, Gloria Coppin, do hereby certify that I am the official court reporter for the District Court of the United States for the Western District of Michigan; that I reported the proceedings in the above-entitled cause on the date shown, and that the foregoing is a true and correct transcript of my stenotype notes taken at said proceedings.

GLORIA COPPIN
U.S. District Court Reporter

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT
(Decided and filed June 4, 1970)

Before Weick and Combs, Circuit Judges, and O'Sullivan, Senior Circuit Judge.

Weick, Circuit Judge. The action in the District Court was brought under the provisions of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e.

Plaintiff's (Dewey's) claim was that he was wrongfully discharged by his employer, the defendant, Reynolds Metals Company (Reynolds), because of his religious beliefs, and he prayed for reinstatement with back pay.

Prior to bringing the action, Dewey filed grievances with Reynolds on the identical claim set forth in his complaint, under the provisions of a collective bargaining agreement entered into by Reynolds with Local 277, United Automobile Aerospace and Agricultural Workers of America, AFL-CIO (UAW), which was the bargaining representative of Reynolds' employees. Dewey was a member of UAW. The grievances were processed and resulted in their submission to a mutually agreeable arbitrator, who made an award denying them on June 29, 1967.

Contemporaneously with the submission of the grievances, Dewey made application to the Michigan Civil Rights Commission for issuance of a complaint against Reynolds, alleging discrimination on account of his religious beliefs.

The following is a Summary of Findings and Order of Dismissal, entered by the Commission on December 13, 1966:

"The findings indicate that the claimant, despite due notice of overtime requirements by the company and the applicable Collective Bargaining Agreement provisions, continued to refuse to perform scheduled overtime work on Sundays and took the position that his right to continued employment while following his religious belief without interference was an absolute right.

"The Commission has previously ruled that where the normal work week and foreseeable overtime requirements are prescribed in a Collective Bargaining Agreement, that absent or (sic) intent on the part of respondent to discriminate on religious grounds, an employee is not entitled to demand any alteration in such requirement to accommodate his religious beliefs.

"The investigation did not reveal any intent on the part of the respondent to discriminate on religious grounds and it is, therefore, recommended that this application for the issuance of a complaint be denied for lack of probable cause.

ORDER OF DISMISSAL

"The Commission has found insufficient grounds on which to issue a Complaint and, therefore, the above Application is herewith denied. This Order of Dismissal shall automatically become effective within 15 days from

the date of mailing unless the Claimant shall demand a hearing prior thereto." (App. 93a-94a)

Dewey requested the United States Office of Federal Contract Compliance to review his charges of religious discrimination, and that office found no basis for a charge of discrimination.

On January 4, 1967, Dewey filed a charge with Equal Employment Opportunity Commission (EEOC), claiming religious discrimination. The Commission, on January 5, 1967, contrary to the recommendation of its Regional Director that the Commission find no probable cause, determined that there was reasonable cause to believe that Reynolds had engaged in unlawful employment practices and authorized the bringing of the present action in the District Court. Reynolds moved for dismissal of the complaint filed in the District Court on the grounds that the arbitrator's award was a final adjudication of the grievances and that they could not be relitigated. The District Judge, in a memorandum opinion, denied the motion to dismiss. 291 F. Supp. 786 (W. D. Mich. 1968).

Reynolds then answered, denying it discriminated against Dewey on account of his religion and pleaded provisions of the collective bargaining agreement which required employees to perform all straight time and overtime work required of them by the company. Reynolds further alleged that Dewey refused to perform overtime work on Sundays or to arrange for another qualified employee to replace him, basing his refusal on his religious convictions. Reynolds, after giving warnings and a three-days' layoff, finally discharged Dewey under

its plant rules for his continued refusal to comply with the provisions of the collective bargaining agreement.

The parties stipulated the facts and the case was tried by the Court without a jury. In a memorandum opinion, the District Judge ruled in favor of Dewey. He ordered Reynolds to reinstate Dewey with back pay and enjoined Reynolds from requiring Dewey to work on Sundays. 300 F. Supp. 709 (W.D. Mich 1969). The District Court refused to stay execution on the reinstatement pending appeal, and required Reynolds to post a $15,000-bond to stay execution on the judgment of $7,286.92 for back pay. 304 F. Supp. 1116 (W.D. Mich. 1969). Reynolds appealed. We reverse.

The applicable statute is 42 U.S.C. § 2000e-2 (a), which provides as follows:

> "(a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . "

The legislative history of the statute is clear that it was aimed only at discriminating practices. Congressional Record, Vol. 110, pages 13079-13080, June 9, 1964.

In order to prove a violation of the Act it was incumbent on Dewey to establish by a preponderance

of the evidence that his employer discriminated against him on account of his religion. In 1964 U.S. Code Cong. & Adm. News, page 2515, it is stated:

> "A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal judiciary . . . . In addition, we believe that the employer or labor union will have a fairer forum to establish innocence since a trial de novo is required in all district court proceedings together with the necessity of the Commission proving discrimination by a preponderance of the evidence."

On page 2516 it is stated:

> "Similarly, management prerogative and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices."

Reference to the collective bargaining agreement indicates rather clearly that the provisions with respect to straight time and overtime work apply to all employees equally and do not discriminate against Dewey or any other employee.

Reynolds operated a "job type" plant, producing, on order, aluminum extrusions and billets. It was necessary therefore for production to be scheduled to meet delivery dates provided for in contracts with customers.

Prior to the 1960 collective bargaining agreement, overtime was performed by employees on a voluntary basis. As a result thereof, with an increase in orders it became impossible to schedule production on Saturdays and Sundays. In order to remedy this difficulty, Reynolds negotiated with UAW the 1960 and 1965 collective bargaining agreements which provided that the company had the right to set straight time and overtime schedules and the employees were obligated to work such schedules unless they had a substantial and justifiable reason for not doing so. The 1965 agreement provided:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the Company except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent."

The agreement provided time-and one-half for work on Saturdays and double time for work on Sundays.

The agreement further provided that overtime work shall be divided as equally as possible. If more employees are needed they are assigned in the inverse order of their seniority. Reynolds also issued an interpretation that any employee assigned to overtime could be relieved from the assignment simply by arranging for another qualified employee to replace him. This system was used extensively.

Dewey had been employed by Reynolds in various capacities since 1951, and at the time of his discharge,

on September 12, 1966, was a die repairman. Since 1961 Dewey has been a member of Faith Reformed Church. He never volunteered for overtime work on Sunday after joining the church although he did volunteer for other days.

Dewey was scheduled to work on Sunday, November 21, 1965. He refused to work because of his religious beliefs. He was given a warning and informed as to the necessity of a seven-day operation and was advised that a repetition would lead to disciplinary action under Plant Rule 11, which prohibits "absence from work without reasonable cause", and provides a three-offense progression of punishment with discharge for the third offense.

Between January and August, 1966, Dewey was scheduled to work on five Sundays. He obtained replacements as provided in the contract. On August 28, 1966, he was scheduled again to work on Sunday, and he not only refused to work but also refused to obtain a replacement on the ground of his religious beliefs. The arbitrator found:

> "(Dewey, it will be recalled, accelerated his disciplinary timetable by telling Zagman (a fellow employee) not to serve as a replacement any more.)"

On September 4, 1966, Dewey refused to work or to obtain a replacement. He was given a written warning and a disciplinary layoff of three days. Again he refused to work or to obtain a replacement on September 11, 1966, and was discharged for violation of Plant Rule 11.

We find nothing discriminatory in the provisions of the collective bargaining agreement or in

the manner in which Reynolds executed it. In our opinion, it provided a fair and equitable method of distributing the heavy workload among the employees without discrimination against any of them.

The District Judge found that the compulsory overtime provision of the collective bargaining agreement "is not discriminatory on its face." We agree. However, he said this is only the first step. He found it was discriminatory in its impact. We disagree. He relied on Sherbert v. Verner, 374 U.S. 398 (1963); but this case involved state, and not private action.

In reaching his decision that the collective bargaining agreement discriminated against Dewey, the District Judge applied retroactively Regulation 1605.1, adopted by EEOC effective July 10, 1967, which was nearly ten months after Dewey had been discharged and after the arbitrator and the Michigan Civil Rights Commission had rejected Dewey's charges.

In our opinion, it would have been more appropriate for the District Court to have applied the EEOC Regulation 1605.1 which was in force at the time of Dewey's discharge, and which became effective June 15, 1966.

The 1966 regulation contained the following provisions which restricted any obligation upon the part of the employer to accommodate to the reasonable religious needs of his employees:

Section 1605.1 (a):

"(3) However, the Commission believes that an employer is free under Title VII to

establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday."

Section 1605.1 (b):

"(3). The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

The 1967 regulation, retroactively applied by the District Court, omitted the above quoted language and other material parts of the 1966 regulation, and instead of providing definite guidelines for the assistance of employers who might be affected, left the matter largely on an ad hoc basis for the decision of the Commission on the particular facts of each case.

It is clear that Reynolds complied with the 1966 regulation. The obligations contained in the collective bargaining contract, which were lawful under the regulations of EEOC then in effect, ought not to be impaired by the application of a subsequently passed inconsistent regulation.

The District Judge took into account his ex post facto application of the 1967 EEOC regulation by starting Dewey's back pay from August 1, 1967, instead of from the date of his discharge, holding that this date was a reasonable time after the 1967 regulation became effective for the company to work out accommodation to it. The trouble with this treatment is that Dewey was no longer in the employ of Reynolds. Having a lawful right at the time to discharge Dewey under the 1966 regulations, Reynolds ought not to be required to re-employ him at a later date and pay his back salary merely because EEOC decided to change the rule by adopting new, inconsistent regulations. The rights of Dewey and Reynolds were governed by the law in effect at the time of the discharge. EEOC could not affect these rights by subsequently adopting a new regulation.

The Act further provides:

> "No order of the court shall require . . . the hiring, reinstatement or promotion of an individual employee, or the payment to him of any back pay, if such individual . . . was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3 (a) of this title." 42 U.S.C. § 2000e-5 (g).

The reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union with his employer, which provisions were applicable equally to all employees. The violation consisted not only of his refusing to work on Sundays, but also his refusing to arrange for a replacement, which was an alternate

procedure. He did arrange for five replacements, but later refused even to do this, claiming that it was a sin. He apparently did not regard it as sinful for him to collect wages from an employer who was compelled to schedule overtime production in order to meet its contractual commitments and eventually meet its payroll.

To accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining agreement among the employees, and could create chaotic personnel problems and lead to grievances and additional arbitrations. The practice of permitting the employee, rather than the employer, to secure the replacement served to insulate the employer against any charge of unequal naming of replacements.

But even if the 1967 regulations are applied, we think that Reynolds complied with Section 1605.1 (b) thereof by making a reasonable accommodation to the religious needs of its employees when it permitted Dewey, by the replacement system, to observe Sunday as his Sabbath.[1] He stubbornly refused to exercise this privilege. The finding of the District

[1] It should be observed that it is regulation 1605.1 (b) and not the statute (§ 2000e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is only discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted.

Court that Reynolds did not make reasonable accommodations to the religious needs of Dewey is not supported by substantial evidence and is clearly erroneous. Rule 52 (a) Fed. R. Civ. P.

The District Court referred to the inalienable right of freedom of religion, which he said is protected by the First and Fourteenth Amendments to the Constitution and the Civil Rights Act. The employer did not question Dewey's right to freedom of religion; Reynolds did question Dewey's right to practice his religious beliefs on it and to interfere with the operation of its plant.

An additional defense is provided in the first sentence of 42 U.S.C. §2000-5(g), which provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice)."

This section of the statute requires a finding that the employer has intentionally engaged in an unlawful employment practice before the court may award relief. Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 341 (D. Ore. 1969).

It can hardly be said that Reynolds intentionally violated the Act when no discrimination was found

by either the Michigan Civil Rights Commission, the Office of Federal Contract Compliance, the arbitrator chosen by agreement of the parties, or the Regional Director of the EEOC in Cleveland. In addition, in order to support his finding of an unlawful employment practice, the District Judge had to apply regulations adopted subsequent to the employee's discharge and ignore those in force at the time the alleged violation took place. The finding of the District Court that there was an intentional violation of the Act is not supported by substantial evidence and is clearly erroneous. Rule 52(a) Fed. R. Civ. P.

Effect of the Arbitration

It is clear that if the arbitrator of the grievances had granted an award to Dewey, instead of to Reynolds, the award would have been final, binding and conclusive on Reynolds. Reynolds would not have been permitted to relitigate the award in the courts. This is the teaching of the United Steelworkers trilogy, which clearly defined the respective functions of the courts and the arbitrator. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 to 602 (1960); Washington v. Aerojet-General Corp., 282 F. Supp. 517 (C.D. Cal., 1968).

In Steelworkers, the Court said:

"When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." (Id. at 569)

The arbitrator had jurisdiction to determine the grievances. The arbitration involved an interpretation of the collective bargaining agreement with respect to Dewey's claims that he had been laid off and discharged because of his religious beliefs. In arbitration proceedings, frequently questions of law and fact are resolved by the arbitrator. Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration.

This result could sound the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street, i. e., that the awards are binding on them but not on their employees.

The tremendous increase in civil rights litigation leads one to the belief that the Act will be used more frequently in labor disputes. Such use ought not to destroy the efficacy of arbitration.

In the supplemental brief of EEOC as amicus curiae, the case of Smith v. Evening News, 371 U.S. 195, 197-198 (1962), is cited for the proposition that "the complainant is not required to elect between his contractual rights or his statutory rights but may seek to vindicate his claim in contractual and statutory proceedings." (EEOC Supp. Brief, p. 3). The writer of the brief neglected to state that the collective bargaining agreement in Evening News

contained no grievance arbitration procedure which had to be exhausted before recourse could be had to the courts. 371 U.S. 196, fn 1.

The question in our case is not whether arbitration and resort to the courts could be maintained at the same time; rather our case involves the question whether suit may be brought in court after the grievance has been finally adjudicated by arbitration.

We see no good analogy between jurisdiction of the National Labor Relation Board and that of EEOC. The Labor Board has adjudicatory powers over unfair labor practices, subject only to judicial review. Orders of the Board may be vacated on review only when they are not supported by substantial evidence upon consideration of the record as a whole. EEOC, on the other hand, has no such power. The District Court considers EEOC cases de novo. The legislative history, from which we have previously quoted, indicates the reason for the difference.

Nor do we find any national policy for ousting arbitrators of jurisdiction to finally determine grievances initiated by employees, based on alleged violation of their civil rights.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint.

Combs, Circuit Judge, dissenting. I respectfully dissent. In my opinion the District Court correctly concluded that the company had not complied with Title VII of the Civil Rights Act in that it failed to make reasonable accommodation to Dewey's religious beliefs.

The Equal Employment Opportunity Commission was formed to further the purposes of the Act, 42 U.S.C. §2000(c)-4, and was granted power to promulgate regulations consistent with the provisions of the Act. 42 U.S.C. § 2000(e)-12(a). The Commission's interpretation of the Act is persuasive although not binding on this Court. It was said in Udall v. Tallman, 380 U.S. 1, 16 (1965): "[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration," citing Unemployment Commission v. Aragon, 329 U.S. 143, 153 (1946); Gray v. Powell, 314 U.S. 402 (1941); and Universal Battery Co. v. United States, 281 U.S. 580 (1930)

Pursuant to its statutory authority, the Commission issued Regulation Section 1605.1, effective July 10, 1967, which provides, inter alia:

> "(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business....
>
> "(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable."

As the majority opinion correctly points out, the 1967 Regulations were not in effect at the time of Dewey's discharge. However, the 1966 Regulations, which were in effect at that time, also provided that "the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodations can be made without serious inconvenience to the conduct of the business." It is thus apparent that the cornerstone of both the 1966 and 1967 Regulations is the obligation of the employer to accommodate the religious needs of employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

This is a reasonable interpretation of the Act. So, the test is whether the company has made reasonable effect to accommodate Dewey's religious beliefs. The only accommodation to which the company points, in addition to requesting volunteers, is the privilege extended to Dewey to obtain replacement for his Sunday overtime assignments. The majority views the existence of this privilege as a reasonable accommodation to Dewey's religious needs, and notes that "he stubbornly refused to exercise this privilege." This "stubborn" refusal on Dewey's part was grounded in his belief that working on Sunday is inherently wrong and that it would be a sin for him to induce another to work in his place. The replacement system was therefore no solution to Dewey's problem. There is a significant failure by the company to show that it could not have obtained a replacement for Dewey without hardship or inconvenience. There is also no showing that Dewey's failure to work himself or to obtain a replacement would have seriously disrupted work schedules or internal discipline. I find

no support in the record for the assertion in the majority opinion that to grant Dewey's request would cause "chaotic personnel problems and lead to grievances and additional arbitrations." I think the company has completely failed to show that Dewey's refusal to work on Sunday would create undue hardship on the conduct of its business.

Nor am I impressed with the argument that to grant Dewey's request would necessarily affect the company's contractual right to require overtime work. No evidence was adduced on this point. The company may not stand flatfootedly on its contractual right to require overtime work. Provisions of the contract must give way to constitutional mandates and valid statutory enactments. The First Amendment right to freedom of religion has always been recognized as one of the Bill of Rights' strongest mandates. Even though this right has not been extended into the field of labor relations, section 703 (a) (1) of the Civil Rights Act is a Congressional directive that reasonable accommodation should be made by management to the religious beliefs of employees when this can be done without undue hardship on the employer. The District Judge did not apply the First and Fourteenth Amendments to the bargaining agreement here involved, but placed his reliance on Title VII of the Act and specifically stated that he did not find it necessary to reach the question whether plaintiff's constitutional rights had been violated.

Lastly, I am unable to agree that Dewey made an election of remedies by first pursuing the grievance procedure under the bargaining agreement and that he is thereby precluded from maintaining this action. Dewey's rights under the collective bargaining agreement and those created by Title VII of the

Act are separate and distinct. The election of remedies doctrine therefore does not apply. See Bowe v. Colgate Palmolive Company, 416 F. 2d 711 (7th Cir. 1969); Bankers Trust Co. v. Pacific Employers Ins. Co., 282 F. 2d 106, 110 (9th Cir. 1960). The Seventh Circuit held in Bowe that a plaintiff suing under 42 U.S.C. § 2000 (e) could "utilize dual or parallel prosecution both in court and through arbitration so long as erection of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment or windfall to the plaintiffs."

I would affirm the judgment.

(In the United States Court of Appeals for the Sixth Circuit - No. 19746)

ORDER

A majority of the Judges of this Court having voted against a rehearing en banc, it is ORDERED that the petition for rehearing be referred to the panel for final disposition. Judges Edwards and McCree voted in favor of a rehearing en banc.

Entered by order of the Court.

(s) Carl W. Reuss
Clerk

(In the United States Court of Appeals for the Sixth Circuit - No. 19746)

OPINION ON PETITION FOR REHEARING

Before Weick and McCree*, Circuit Judges, and O' Sullivan, Senior Circuit Judge.

Weick, Circuit Judge. It is contended that we have adopted a narrow construction of the Civil Rights Act and the Regulations adopted by EEOC thereunder. We submit that we have not. The legislative history of the Act expresses a clear Congressional intent to inhibit only discrimination against an individual because of his race, color, religion, sex or national origin. The plain language of the statute, Section 2000e-2 (a) of Title 42, is susceptible of no other meaning.

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.

The collective bargaining agreement, by which all employees were obligated to perform straight

*Judge McCree was designated by the Chief Judge as the third member of the panel, to take the place of Judge Combs who resigned as a member of the Court on June 5, 1970, prior to the filing of the petition for rehearing. The designation was made in order that Judge McCree may file a dissent expressing his views.

time and overtime required of them by the company, was equally and uniformly applied to all of the employees, and it discriminated against no one.

To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. It is settled that the Government, in its relations with religious believers and nonbelievers, must be neutral. The Government is without power to support, assist, favor or handicap any religion. See Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Torcaso v. Watkins, 367 U.S. 488 (1961); Everson v. Board of Educ. 330 U.S. 1 (1947); Prince v. Massachusetts, 321 U.S. 158 (1944).

In Braunfeld v. Brown, 366 U.S. 599 (1951), the Court upheld a state Sunday Closing Law against the contention that it operated to prohibit the free exercise of appellant's religion which observed Saturday as the Sabbath.

No one disputes Dewey's right to his religious beliefs. The question is whether he has the right to impose his religious beliefs on his employer and interfere with the operation of its plant. As Mr. Justice Douglas pointed out in his concurring opinion in Sherbert v. Verner, 374 U.S. 398 (1963), the religious beliefs of individuals may take on many forms. He mentioned specifically only a few, including Moslems, who attend a mosque on Friday and pray five times daily; Sikh, who carry a symbolic or regular sword; Quakers who affirm instead of swearing;

and Seventh Day Adventists, who observe Saturday as Sabbath and eat only certain meats.

The arbitrator in his award stated that an employee might even join a religious organization which observed Wednesday as Sabbath.

It is argued that under EEOC Regulations the employer is required to make only reasonable accommodations to the religious needs of his employees. The employee may claim that all of his religious needs are reasonable, irrespective of discrimination, and file charges with EEOC against his employer for failure to accommodate them. An employer with thousands of employees could certainly be harassed by the filing of many of such claims. This would also present serious problems for labor organizations to cope with.

Congress did not intend that employers or labor organizations should be harassed with respect to claims not involving discrimination. In the legislative history of the Act it is stated:

> "Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." 1964 U.S. Code Cong. & Adm. News, at 2516.

The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.

Dewey entered the employ of Reynolds before he acquired his religious beliefs. The 1960 collective bargaining agreement was also entered into prior to that time. After he acquired his religious beliefs, his employer did endeavor to make accommodation to the religious beliefs of its employees by interpreting the agreement so as to permit any employee assigned to overtime to be relieved from the assignment simply by arranging for another qualified employee to replace him. We hold that this was a reasonable accommodation.

Dewey, with no difficulty, did arrange for replacements on five different occasions, and then he decided not only that it was a sin for him to obtain a replacement, but the arbitrator found specifically that Dewey told his replacement, Zagman, "not to serve as a replacement any more."

While it was stipulated that Dewey was sincere in his beliefs, he offered no proof that the tenets of his church forbade his designating a replacement to serve in his place on Sundays. The fact that he was sincere in his beliefs gave him no greater rights.

Moreover, the retroactive application of the 1967 Regulations to the 1966 discharge is justified by EEOC in its amicus brief, with the assertion that its Regulations are only "interpretations" and that "the timing of the Commission interpretations is irrelevant" since the 1966 Regulation is now a "defunct Commission guideline." Although defunct in 1967, it was certainly in full force and effect in 1966 and authorized the employer to prescribe

> "the normal work week and foreseeable overtime requirements and absent an intent to discriminate on religious grounds, a job applicant

> or employee who accepted the job knowing or having reasonable grounds to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

Dewey did not acquire his religious beliefs until after his employer had entered into the 1960 collective bargaining agreement which required all employees to work overtime. Dewey thus had actual knowledge that the requirements of the collective bargaining agreement would conflict with his subsequently acquired religious needs. Under the regulations in force at the time, which EEOC claims are now defunct, the employer was under no obligation to accommodate. There was no claim that the employer intended to discriminate on religious grounds. These regulations had the force and effect of law. Their subsequent repeal, after the discharge, ought not to affect the rights or obligations of either party.

The simple answer, however, to all of Dewey's claims is that the collective bargaining agreement was equal in its application to all employees and was uniformly applied, *discriminating* against no one.

Effect of the Arbitrator's Award

The case of Culpepper v. Reynolds Metals Co., 421 F. 2d 888 (5th Cir. 1970), is relied on in support of the proposition that an employee may utilize both arbitration and an action under Title VII of the Civil Rights Act. In Culpepper, however, only a grievance was filed, which was never processed through arbitration. Culpepper involved racial discrimination, which a majority of the panel thought was so serious as to impose --

". . . the duty on the courts to make sure that the Act works . . ."

Circuit Judge Coleman, who filed a concurring opinion, disagreed rather vigorously that any such duty was imposed on the Courts. He stated:

"Under our Constitutionally ordained form of Government, whether an Act works or fails is the concern of the Executive or Legislature, or both -- not the courts."

We do not regard it as our function to enlarge on the plain language of a statute so as to impose on citizens obligations never intended by Congress, in order to make it work.

Great reliance is placed upon Hutchings v. United Industries, Inc., ... F. 2d ..... (5th Cir. 1970), which was decided after our decision in the present case was announced. In our opinion Hutchings does not comport with Boys Markets, Inc. v. Retail Clerks Union, Local 770, ... U.S..... (1970), 38 U.S. L. Week 4462.

In Boys Markets, Mr. Justice Brennan emphasized the importance of arbitration in the settlement of labor disputes. He said:

"However, we have frequently noted, in such cases as Lincoln Mills, the Steelworkers Trilogy, and Lucas Flour, the importance which Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as means to this end. Indeed, it has been stated that Lincoln Mills, in its exposition of § 301 (a),

'went a long way towards making arbitration the central institution in the administration of collective bargaining contracts.'

"The Sinclair decision, however, seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices. Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly effcacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking." [footnote omitted].

Similarly, employers would be wary of arbitration clauses in collective bargaining agreements if, as in the present case, the arbitration is binding on them only and not on their employees.

Our case is even stronger than Boys Markets because the grievance here was submitted to arbitration and the arbitrator made an award which was final, binding and conclusive on the parties. It is as binding as a judgment. 5 Am Jur. 2d, ARBITRATION AND AWARD, § 147. It remains in full force and effect.

The amicus brief of NAACP Legal Defense Fund candidly recognizes that "[i]t may be true that the result of such an accommodation will be that the employer but not the employee will be bound by the decision of the arbitrator." (Brief, p. 14).

We know of no good reason why an award of an arbitrator should not be binding on both parties, the same as a judgment of a court.

It is difficult for us to believe that any employer would ever agree to arbitration of a grievance if he knew that the employee would not be bound by the result.

The importance of arbitration in the resolution of all labor disputes is the theme of the United Steel Workers Trilogy, 363 U.S. 564-602 (1960). The purpose of arbitration is thwarted if the awards are held by the courts to be binding on employers only and not on employees..

The petition for rehearing is denied.

McCree, Circuit Judge (dissenting). I would grant the petition for rehearing and affirm the judgment of the District Court for the reasons stated in the dissenting opinion of Judge Combs. Furthermore, I observe that in addition to the Seventh Circuit, Bowe v. Colgate-Palmolive Co., 416 F. 2d 711 (1969), the Fifth Circuit has held that appellee's invocation of the grievance-arbitration procedure did not bar him from proceeding in the District Court under Title VII of the Civil Rights Act. Hutchings v. United States Industries, Inc., No. 28750 (5th Cir. June 19, 1970).

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No 835

ROBERT KENNETH DEWEY,
Petitioner,

vs.

REYNOLDS METALS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No ---------.

ROBERT KENNETH DEWEY,
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vs.

REYNOLDS METALS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on June 4, 1970 and the final opinion after the Petition for Rehearing entered on August 11, 1970.

The opinion of the district court denying respondent's motion to dismiss (Pet. App. 9a-16a) is reported at 291 F. Supp 786. The opinion of the district court ruling for petitioner on the merits (Pet. App. 18a-28a) is reported at 300 F. Supp 709. A third opinion of the district court on a motion to stay execution (Pet. App. 29a-35a) is reported at 304 F. Supp 1116. The initial opinions of the court of appeals (Pet. App. 41a-55a) are reported at ..... F. 2d ..... The opinions on petition for rehearing (Pet. App. 57a-63a) are reported at ..... F.2d ..... All of the above are reproduced in the Appendix.

JURISDICTION

The original decision of the court of appeals was filed on June 4, 1970. Rehearing was denied on August 11, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides:

> "It shall be an unlawful employment practice for any employer —
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin;"

29 C.F.R. §1605.1 (the 1967 Regulation) provides as follows:

> "§1605.1 OBSERVATION OF THE SABBATH AND OTHER RELIGIOUS HOLIDAYS.
>
> "(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> "(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hard-

ship renders the required accommodations to the religious needs of the employee unreasonable."

29 C.F.R. §1605.1(b)(4) (The 1966 Regulations) provides as follows:

"Where an employee has been previously employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."

QUESTIONS PRESENTED

1. Whether an employer engages in religious discrimination in violation of Section 703 (a)(1) of the Civil Rights Act of 1964 if he refuses to make reasonable accommodations to the religious observance of a weekly day of rest by an employee.

2. Whether an employee who has sought arbitration on his claim of wrongful discharge under the labor agreement is barred from bringing an action in a federal district court under the Civil Rights Act of 1964 arising out of the same discharge.

STATEMENT

Petitioner has been a member of the Faith Reformed Church since December 4, 1961 (3a).[1] His faith — the sincerity of which is not contested — prevents him from working on Sundays or asking anyone to work on Sundays

[1] Appendix A is the Stipulation entered into between the parties and filed with the District Court on March 17, 1969.

in his stead (4a-5a). Petitioner was employed by respondent at its Wyoming, Michigan, plant since June 14, 1951, and held various jobs at the plant, culminating with the job of "die repairman," until September 12, 1966, when he was discharged (1a). The work done at the plant is of a "job type," involving the production of aluminum extrusions and aluminum billets for industries such as architecture, building, transportation, aircraft and missiles (1a).

Prior to 1964, the plant operated on a five-day-a-week basis. Subsequently, with increasing volume, the plant's operations were increased to six days a week, with overtime scheduled for a part of the employees on numerous Sundays (2a). Under respondent's collective bargaining agreement with UAW, Local 277 (of which petitioner was a member in good standing), respondent had the right to set overtime schedules and compel employees to work overtime "except when an employee has a substantial and justifiable reason for not working." At the request of the union, respondent in 1965 issued an interpretative statement regarding this provision in which it announced that any employee assigned to overtime could be relieved of that assignment by arranging for another qualified employee to replace him. This system of substitution has been utilized "extensively" in respondent's plant since 1965 in many situations.

Petitioner was first assigned to Sunday overtime work on November 21, 1965, and he refused to work then because of his religious beliefs. He was admonished and told that a repetition of such conduct would lead to disciplinary action. On at least five occasions between January and August, 1966, petitioner was assigned to Sunday overtime work and obtained a replacement. On August 28, 1966, petitioner was again assigned Sunday work, and he refused to request a fellow employee to substitute for him on the ground that the making of such a request would violate his religious beliefs. The same sequence of events occurred with respect to Sunday assignments on September 4 and 11, 1966. On account of these absences, petitioner was discharged from employment on September 12, 1966 (4a-5a). Petitioner had volunteered for overtime on days other than Sunday (4a).

In addition to pursuing various remedies under the labor contract and local civil rights statutes, petitioner filed a charge with the Equal Employment Opportunity Commission alleging that he was the victim of religious discrimination. The Commission (overruling a recommendation of a regional director) found that there was reasonable cause to believe that respondent had engaged in religious discrimination, and it instituted conciliation efforts. When conciliation failed, petitioner began this action in the district court, by filing his complaint based on §703 of Title VII of the Civil Rights Act of 1964 (42 USC §2000e-2(a)(1)) (8a).

On the merits, the district court held that respondent had violated Section 703(a)(1) of the Civil Rights Act of 1964 by discharging petitioner on account of his refusal to work on Sunday or obtain a replacement (18a-28a). The court relied on the interpretative regulation issued by the Equal Employment Opportunity Commission, which requires employers "to make reasonable accommodations to the religious needs of . . . employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1(b). The court noted that, as in *Sherbert v. Verner*, 374 U.S. 398 (1963), the petitioner had "been forced to choose between his religion and his job." The court also found that respondent had made "no accommodation whatsoever" to petitioner's religious belief that asking anyone to work on Sunday, in his place "would be as much a sin as working himself on Sunday" and that, under the applicable regulation, respondent had failed to demonstrate "any undue hardship" in accommodating to petitioner's request not to work on Sundays (24a-27a).

A majority of the court of appeals (Weick and O'Sullivan, J.J.) reversed on the ground that there was "nothing discriminatory" in respondent's conduct with respect to petitioner (47a). The majority judges viewed the application of the Equal Employment Opportunity Commission interpretative regulation as *ex post facto* since it was not until July 10, 1967 (48). They also concluded that sufficient accommodation under the regulation had been made by respondent when it generally authorized the use of replacements — a privilege which, according to the

majority petitioner "stubbornly refused to exercise" (49a-50a).

The majority also held that petitioner's district court action was barred because he had initially elected to pursue the arbitration remedy available under the collective bargaining agreement (51a-53a). Circuit Judge Combs dissented on the ground that the respondent had made "no showing" of disruption of work at the plant by accommodation to petitioner's demands and that the Commission's regulation required such an accommodation (53a-55a).

A timely petition for rehearing and suggestion for rehearing *en banc* were filed. Rehearing *en banc* was denied, with Circuit Judges Edwards and McCree dissenting (56a). Consideration of the petition for rehearing by the initial panel resulted in its denial, with the majority stating that "[t]he requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act" (57a). Circuit Judge McCree, (disignated by the Chief Judge to substitute for Judge Combs, who had resigned since the original panel decision) dissented for the reasons stated in Judge Combs' opinion (57a).

REASONS FOR GRANTING THE WRIT

1 (a) The majority of the court below has construed the Civil Rights Act's prohibition against religious discrimination in a manner which conflicts with binding decisions of this Court and with decisions of other United States Courts of Appeals in related areas. In substance, the majority below has held that an employment policy which appears even-handed on its face is not unlawful even though its practical and operational effect is to hinder and discourage faithful observance of religious holidays — notwithstanding the fact that an accommodation to such observances would result in negligible or minor inconveniences to the employer. This holding is recognized by the majority below to be inconsistent with the interpretation given by the Act by the federal agency with which administrative jurisdiction has been vested. The necessary

effect of the decision is to render the hundreds of thousands or millions of Americans whose religious convictions require them to observe Sunday or another day of the week as a day of total rest vulnerable to unjustified economic reprisals on account of their adherence to their faith. It follows that such a rule pressures the faithful and observant adherent of a religious belief to forego the practices commanded by his belief.

This result is plainly forbidden by Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), which prohibits an employer from discharging an employee or discriminating against him "because of such individual's . . . religion." The term "religion" as used in the Act was apparently construed by the majority below as protecting only petitioner's beliefs, and not the practices demanded by these beliefs. The definition of discrimination implied in that conclusion conflicts with this Court's decision in *Sherbert v. Verner*, 374 U.S. 398 (1963) which holds that the term "religion" as used in the First Amendment extends beyond religious beliefs to observances which do not pose a "substantial threat to public safety, peace or order." 374 U.S. at 403. In the *Sherbert* decision the Court held that only a "compelling" or "paramount" interest would justify the inhibition of a religious practice such as the faithful observance of a day of rest. That principle is as fully applicable here as it was in In *Matter of Jenison*, 375 U.S. 14 (1963), where religious scruples against jury service were summarily determined to be a constitutional bar to a contempt conviction for refusal to serve upon a jury.

(b) The decision of the majority below also conflicts in principle with the decision of the Court of Appeals for the district of Columbia Circuit in *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969), where it was held that prison officials were constitutionally obliged to accommodate to the conscientious religious dietary practices of prisoners in the absence of compelling justifications. In the *Barnett* case the request that the prison offer "one full-course pork-free diet once a day" was held to constitute "modest . . . official deference to . . . religious obligations" which would be constitutionally required. 410 F.2d at 1001. Surely the obligation that the employer select a substitute for peti-

tioner is far more "modest" than the requirement in *Barnett*.

Nor is there merit to the assertion in the opinion below that respondent did make "a reasonable accommodation to the religious needs of its employees" by permitting petitioner to obtain a replacement. The "replacement system" was no accommodation whatever to petitioner's conscientious scruples against personally asking other employees to work on Sunday.

(c) The flat rejection by the majority below of the Equal Employment Opportunity Commission's considered interpretation of the statute conflicts with this Court's ruling in *Udall v. Tallman*, 380 U.S. 1, (1965) that "when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." 380 U.S. at 16. It also conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (1969), where similar interpretative guidelines relating to discrimination on account of sex were sustained and applied on the authority of *Udall v. Tallman, supra*.

(d) The decision of the majority below conflicts squarely with the unappealed decision of the United States District Court for the Eastern District of Louisiana in *Jackson v. Veri Fresh Poultry Co.*, 304 F.Supp. 1276 (1969), where Section 703(a)(1) of the 1964 Act was held to have been violated by the discharge (on November 16, 1966) of a Seventh-Day Adventist because her religious convictions prevented her from working between sundown on Friday and sundown on Saturday. In that case, the interpretative regulation of the Equal Employment Opportunity Commission (also issued, as here, *after* the date of the discharge) was sustained in its application to the case. And the court relied explicitly on the decision of the district court in this case, which it found "strikingly similar" to the facts before it. 304 F.Supp. at 1278. Although the *Jackson* decision was not appealed to the Court of Appeals for the Fifth Circuit, it stands as the leading decision on the meaning of the statutory provision in the largest urban center in the Circuit. Consequently the effects of the con-

flict between the decision below and that in the *Jackson* case is every bit as serious to the orderly administration of this important statute as if the *Jackson* case had been decided by the Court of Appeals.

2 (a) The majority below recognized that its decision on the election-of-remedies issue conflicted with decisions of the Seventh and Fifth Circuits in *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (1969), and *Hutchings v. United States Industries*, ... F.2 ..... (1970) respectively (61a). In this case, petitioner was first subjected to a disciplinary layoff after his failure to work on Sunday, September 4, 1966, and his refusal to obtain a replacement for that day. He filed a grievance under the labor contract on September 7, 1966. He was discharged after again refusing to work on Sunday, September 11, 1966. On September 16, 1966, he filed a complaint with the Michigan Civil Rights Commission and three day later, on September 19, 1966, he filed another grievance under the labor contract. On December 13, 1966, the Michigan Commission dismissed his complaint, and on January 4, 1967, petitioner filed, within the time provided by Section 706(d) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(d), a complaint with the Equal Employment Opportunity Commission. Petitioner's labor-contract grievances were finally decided on June 29, 1967.

To say that this course of action — in which the State and Federal civil-rights remedy for discharge was even sought *before* the filing of the labor-contract grievance — should amount to an "election" of the Grievance Procedure is plainly unsound. The important policies underlying the decisions of this Court sustaining labor arbitration procedures are totally inapplicable to an employee who primarily and actively pursues statutory civil-rights remedies and only secondarily requests the employer and the union to correct the infringement of his rights under the labor agreement. The labor agreement and the statute protect against different violations. Even if the labor agreement was not violated by the discharge of petitioner, the matter of the violation of petitioner's rights protected by the Act is a separate question to be determined in entirely different procedures established by the Act. Hence there is no basis

in reason for requiring an employee such as petitioner to "elect" between remedies; he may pursue both to determine whether either of two distinct protections granted him have been infringed.

(b) The majority below curiously approved the language of the Court of Appeals for the Fifth Circuit in *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970), but failed to see its obvious relevance to this case:

> Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not just with an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. *It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics.* (emphasis added)

Title VII of the Civil Rights Act of 1964 was adopted to end not merely racial discrimination in employment, but also discrimination based upon religion, national origin and sex. In each of these areas, "the ability to provide decently for one's family in a job or profession" is involved, and as to each the Act "provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination." The legal issues presented by this case are, therefore, of the same degree of importance as those in *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), in which this Court granted certiorari on June 29, 1970, to determine whether the use of non-job-related tests operates to achieve racial discrimination within the reach of Section 703(a) of the Civil Rights Act of 1964.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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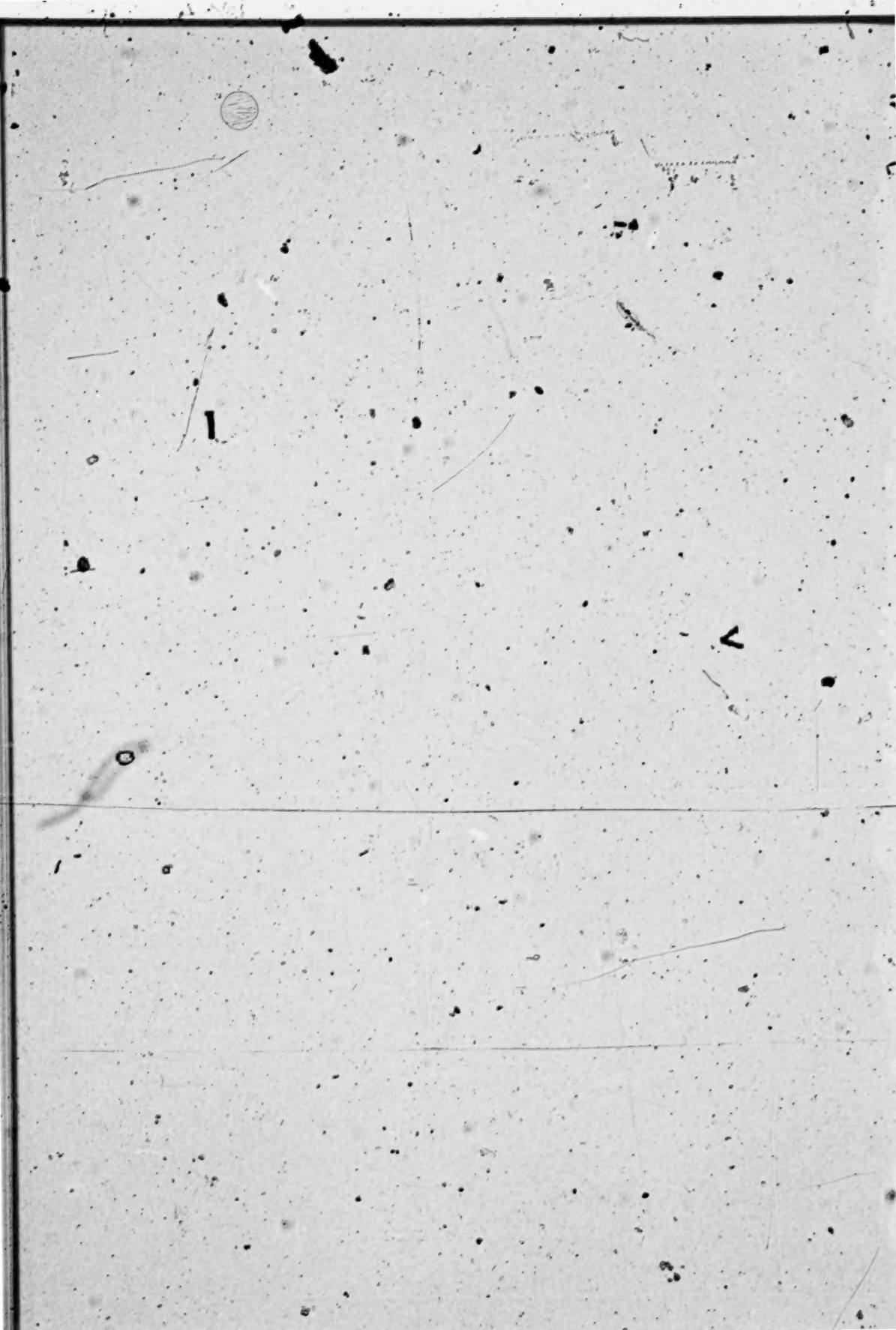

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APPENDIX A

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT KENNETH DEWEY,
Plaintiff,

vs. Civil Action No. 5889

REYNOLDS METALS COMPANY,
Defendant.

STIPULATION OF FACTS
(Filed March 17, 1969)

NOW COMES the Plaintiff by his attorneys, Vander Veen, Freihofer & Cook and the Defendant by its attorneys Cross, Wrock, Miller & Vieson, and hereby mutually stipulate and agree that the following facts are true and that proofs need not be presented at the trial of the within cause in support of the matters to which the parties hereby stipulate.

1. Plaintiff was employed by Defendant at its Wyoming, Michigan plant on June 14, 1951, holding various jobs until he became a die repairman, which was the job he held at the time of his discharge September 12, 1966.

2. Defendant is a corporation with its executive offices in Richmond, Virginia and maintains a "job type" plant in Wyoming, Michigan where it produces on an order basis aluminum extrusions and aluminum billets for such industries as architecture, building, transportation, aircraft and missile.

3. Prior to 1964 the plant operated on a five day weekly schedule. Because of increased business, during 1964 and 1965 the plant operated on "five plus" days weekly schedule. During late 1965 and 1966 the plant operated on a "six plus" days weekly schedule utilizing Saturdays regularly and requiring numerous Sunday work schedules. Between January 1, 1966 and September 11, 1966, Sunday production took place on twenty-four (24) of thirty-seven (37) Sundays.

4. The production and maintenance employees at Defendant's plant (which classifications include that of Plaintiff) have been and continue to be represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (now known as UAW) and its Local 277 (hereinafter called the Union).

5. Plaintiff was at all times during his employment by Defendant a member of the Union in good standing.

6. Prior to the 1960 Labor Agreement between Defendant and the Union, overtime was performed on a basis that was voluntary on the part of each employee and under such circumstances the scheduling of production was made impossible on certain overtime days.

7. The 1960 Labor Agreement and subsequent Labor Agreements, including the 1965 Labor Agreement, between Defendant and the Union include a section giving Defendant the right to set overtime schedules and make it compulsory for the employees to work such schedules unless they have a substantial and justifiable reason for not doing so. The section in question in the 1965 Labor Agreement is found at Article IX, Section 3, and reads as follows:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required

to work more than twelve (12) continuous hours without his consent."

(Exhibit A attached hereto).

8. The 1965 Labor Agreement also provides, in Article IX, Section 4, that overtime work shall be divided as equally as possible among employees in each job classification in each department; that if less than all of the qualified employees in a classification in a department are needed on other than a normal straight time work day, the number required will be scheduled in accordance with the overtime chart and when the required number of employees cannot be obtained in this manner, overtime is to be assigned by the Defendant Employer among the employees who are offered such overtime in the inverse order of their seniority.

9. In response to a Union objection to the compulsory overtime clause, the Defendant Employer under date of September 20, 1965, issued an interpretation of the Labor Agreement which said in effect that any employee assigned to overtime could be relieved from that assignment by arranging for another qualified employee to replace him. This system of employees furnishing their own replacements has been utilized extensively since September 1965. (Exhibit B attached hereto).

10. Defendant established in 1957 Plant Rules and a copy of such Rules was posted in each department. Plant Rule 11 includes "absence from work without reasonable cause" and calls for a warning for the first offense, a one week layoff for the second offense and discharge for the third offense. Said Plant Rules also state: "Depending upon the seriousness of the offense and other factors in the judgment of Management, the Company reserves the option of imposing a lesser penalty than that indicated." (Exhibit C attached hereto).

11. Plaintiff has been a member of the Faith Reformed Church since December 4, 1961. This church is a local church in the Reformed Church of America.

12. Plaintiff never volunteered for Sunday overtime work from December 4, 1961 to date of discharge because of his religious beliefs.

13. Plaintiff did volunteer for overtime work on days other than Sunday since becoming a member of the Faith Reformed Church.

14. Plaintiff was scheduled to work overtime on Sunday, November 21, 1965 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs; he was given a verbal warning; was advised of the necessity (in Defendant's judgment) of Defendant scheduling work on a seven day basis and was advised that a repetition of his conduct would lead to disciplinary action under Plant Rule 11.

15. Plaintiff was scheduled to work overtime on at least five (5) Sundays from January 1966 to August 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff did not work on such assigned days but did obtain replacements on each of the days in question in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto.

16. Plaintiff was scheduled to work overtime on Sunday, August 28, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs and refused because of his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto. At this time Plaintiff told a fellow employee, Jake Zagman, who had been serving as his replacement that Plaintiff would not request said fellow employee to serve as his replacement again. Plaintiff was given a written warning for violation of Plant Rule 11. (Exhibit D attached hereto). Seven (7) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-five (255) employees in the plant, one hundred ninety (190) worked.

17. Plaintiff was scheduled to work overtime on Sunday, September 4, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs and refused because of

his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto. Plaintiff was given a written warning together with a disciplinary layoff of three (3) days for violation of Plant Rule 11. (Exhibit E attached hereto). Four (4) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-three (253) employees in the plant, one hundred seventeen (117) worked.

18. Plaintiff filed Grievance No. 621 dated September 7, 1966 with Defendant. (Exhibit F attached hereto).

19. Plaintiff was scheduled to work overtime on Sunday, September 11, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff again refused to work because of his religious beliefs and also refused because of his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 and as more specifically set forth in Exhibit B attached hereto. Plaintiff was discharged for violation of Plant Rule 11. (Exhibit G attached hereto). Five (5) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-eight (258) employees in the plant, one hundred twenty-four (124) worked.

20. Plaintiff filed Grievance No. 629 which was received by Defendant's Personnel Department on September 19, 1966. (Exhibit H attached hereto).

21. Both the Defendant's interpretation and past practice indicate that the Defendant cannot compel an employee to accept an overtime assignment in other than his own classification.

22. On and after August 28, 1966 there were two (2) employees who were in other classifications, but who nonetheless were qualified as die repairmen.

(a) One of the aforementioned employees, Jake Zagman, worked on August 28, 1966 and on September 4, 1966. Zagman did not work on September 11, 1966

but was available for work; however, Defendant could not compel Zagman to work outside his classification.

(b) William Boyer, the second of the two aforementioned employees, worked on August 28, 1966 and on September 11, 1966. Subsequent to September 4, 1966 but prior to September 11, 1966 he had been reclassified as a die repairman and worked in such capacity on September 11, 1966. Boyer did not work on September 4, 1966 but was available for work; however, Defendant could not compel Boyer to work outside his classification.

23. If Plaintiff were to be relieved of the obligation of obtaining his replacement in accordance with the replacement system referred to in Paragraph 9 above, it is Defendant's contention that this would result in a waiver of the compulsory overtime provisions of the Labor Agreement.

Further; Plaintiff does not by this Stipulation intend agreement with or acceptance of Defendant's contention; but rather, the parties have so stipulated in order to include that which Defendant included as a defense in its Answer No. 24 to Plaintiff's Interrogatory No. 24, which Answers and Interrogatories have hereinbefore been filed.

24. *The sincerity of Plaintiff's personal religious beliefs* is not contested by the Defendant.

25. Plaintiff had expressed his religious beliefs against Sunday work to the Defendant—prior to having been scheduled for the above three (3) Sundays in 1966.

26. Prior to the discharge of Plaintiff, Defendant had taken disciplinary action as to a number of other employees who refused overtime work assignments on Sunday because of their religious beliefs when scheduled pursuant to the compulsory overtime provisions of the Labor Agreement. The following are the disciplinary actions taken: Written warnings were issued to four (4) employees; three (3) day layoffs were given to three (3) employees; four (4) employees were discharged, which number included two (2) supervisors. Defendant had also taken disciplinary action

as to other employees who refused overtime work assignments on days other than Sunday when scheduled pursuant to the compulsory overtime provisions of the Labor Agreement.

27. Pursuant to the Collective Bargaining Agreement between Defendant and the Union, Plaintiff's grievances pertaining to his three (3) day layoff and his discharge were processed through the various steps of the Grievance Procedure, finally resulting in the grievances being submitted to arbitration. Under date of June 29, 1967 the arbitrator sustained the layoff and the discharge and denied the grievances. (Exhibit I attached hereto).

28. During the period 1960 to 1966 inclusive, no employee employed by Defendant at its Wyoming plant in the die repair classification refused to work on Sunday because of religious beliefs and refused to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above, except the Plaintiff Dewey.

29. On or about September 16, 1966, Plaintiff filed with the Michigan Civil Rights Commission an application for the issuance of a Complaint alleging that he had been subjected to discriminatory treatment and discharged because of religious beliefs. Defendant was advised of the filing of such application by letter from the Civil Rights Commission dated September 19, 1966. (Exhibit J attached hereto).

30. Under date of December 13, 1966 (mailed on December 14, 1966), the Michigan Civil Rights Commission issued a Notice of Disposition and Order of Dismissal stating that the Commission had found insufficient grounds on which to issue a Complaint and that the application for Complaint was denied. (Exhibit K attached hereto).

31. Under date of January 4, 1967, Plaintiff filed a charge with the Equal Employment Opportunity Commission alleging discrimination on the basis of religion. (Exhibit L attached hereto). The charge was served on Defendant on July 19, 1967.

32. Under date of January 5, 1968 the Equal Employment Opportunity Commission, notwithstanding the recom-

mendation of the Regional Director of the Cleveland, Ohio Regional Office, that the Equal Employment Opportunity Commission find no probable cause, issued a letter to Defendant Employer stating that the Commission had determined that there was reasonable cause to believe that Defendant Employer had engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964. (Exhibit M attached hereto).

33. Following conciliation efforts by the Equal Employment Opportunity Commission, said Commission in a letter dated May 3, 1968 advised Plaintiff of the failure of conciliation efforts and notified Plaintiff that he could within thirty (30) days institute a civil action in the appropriate Federal Court alleging an unlawful employment practice. Within thirty (30) days after said letter, Plaintiff commenced this action.

34. The foregoing Stipulation is intended to cover all facts except those relating to Plaintiff's alleged damages. If the parties are not able to stipulate as to such alleged damages, there will be a further hearing covering the matter of damages.

Respectfully submitted,

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APPENDIX B

(In the United States District Court for the Western District of Michigan, Southern Division — No. 5889)

OPINION DENYING DEFENDANT'S MOTION TO DISMISS

This is an action arising under Title VII of the Civil Rights Act of 1964, 42 USC §2000(e), which provides, *inter alia*, for relief against religious discrimination in employment.

Plaintiff, Robert Dewey, was employed by defendant from July 14, 1951, until September 12, 1966. Dewey held a number of jobs with defendant; at the time of his termination he was employed as a die repairman. Since 1962, plaintiff has been a member of the Reformed Church, and, consistent with his religious beliefs as a member of that church, he has refused to work on Sundays.

In 1960, a new labor-management agreement was executed between the UAW-AFL-CIO and defendant Reynolds Metals Co. That agreement provided that the company could schedule compulsory overtime work, including Sundays. This provision was carried forward in the 1965 labor-management agreement, which was in effect at the time of the termination which is the basis of this action.

From 1960 until late 1965, the compulsory overtime provision was not exercised and the company functioned on a five-day work week schedule. Late in 1965, the defendant began scheduling Sunday overtime, and in a bulletin dated September 20, 1965, the defendant agreed to allow employees to be relieved of Sunday work if they obtained a qualified replacement.

Dewey was scheduled to work on August 7, 1966, and August 14, 1966, both Sundays. Defendant alleges that, at plaintiff's request, a fellow employee worked as his replacement under the provisions of the bulletin dated September 20, 1965. However, Dewey did not report for work

on August 28, 1966, September 4, 1966, or September 11, 1966, all Sundays, having previously made it expressly known to the defendant that it was against his religious beliefs to work on Sundays and that he would not procure a substitute because it was his belief that if it was not right for him to work on Sundays, it would not be right to encourage another to work, regardless of the substitute's religious beliefs. Plaintiff said that the company should obtain a substitute so as to accommodate his religious beliefs.

The September 11 absence resulted in a third written offense and plaintiff was terminated pursuant to Company Rule 11. Believing that he had been discriminatorily discharged because of his religion, plaintiff filed a grievance to this effect, in accordance with the provisions of the 1965 collective bargaining agreement. The grievance was processed through various stages of the grievance procedure and was decided adversely to the plaintiff. An arbitration hearing was held April 27, 1967, and in an opinion and award dated June 29, 1967, arbitrator Mark L. Kahn decided against plaintiff. At the hearing, plaintiff was represented by the union in the persons of the International Representative and the chairman of the bargaining committee. He was not represented by an attorney, although the company was. A post-hearing brief was filed by the company, but no brief was filed by the union.

The arbitrator's decision was based in part on "the fact that a grievance protesting the discharge of Knight [another employee] in August 1966 for refusing Sunday work on religious grounds was later withdrawn [by the union]." (Arbitration award, at 8.)

Another reason given was the finding of the arbitrator that "the agreement does not permit a regular and continuing refusal of all Sunday work on religious grounds." (Arbitration award, at 8.)

Plaintiff thereupon filed a similar charge with the Michigan State Civil Rights Commission. The Commission found that there were insufficient grounds upon which to issue a complaint against defendant.

Plaintiff then filed a charge with the Equal Employment Opportunity Commission alleging that he had been dis-

criminated against because of his religion. The Commission investigated the charge and determined that there was reasonable cause to believe that the employer had violated the provisions of Title VII. The Commission, unsuccessful in its attempts to obtain a conciliation agreement, notified the plaintiff of his right to bring a suit under Section 706 of the Act. This suit was instituted on May 31, 1968, and it is now before the court on a motion filed by defendant to dismiss the complaint on the ground that the plaintiff, by pursuing the grievance procedure under the collective bargaining agreement, had made a final, binding election of remedies and is therefore precluded from maintaining a suit to enforce his rights under Title VII.

The relevant legal issues easily divide into two: (1) whether by pursuing the grievance procedure to a conclusion, plaintiff made an election of forums which now precludes his suit in this court; (2) whether the constitutional guarantee of freedom of religion permits this court to review the arbitrator's decision or make a decision on the merits. Each of these issues will be discussed in turn.

I.

Defendant argues that by pursuing his remedy under the grievance procedure, plaintiff made a binding election of forums. Defendant relies on Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967), which granted a motion to dismiss in a case involving a discharge for alleged improper discrimination based on sex. That court said at pages 337-338:

> "It is also the belief of the court that the employee should not be permitted to proceed on the same allegedly wrongful incidents both in the court and pursuant to his contractual remedies."

The reason for this requirement of an election was that "it would be inequitable and unconscionable to subject the defendant Colgate to two series of extensive litigation, one series in this court and then another series under the labor contract." Id. at 366-7.

The second case relied upon by defendant is Washington v. Aerojet-General Corp., 282 F. Supp. 517 (C.D. Cal. 1968). That case involved a charge of racial discrimination, and the court refused to go as far as the court in Bowe, supra. In Washington, a settlement had been reached between the union and the company prior to arbitration. The court held that once that settlement was accepted by both sides, the employee would be precluded from continuing with any court action under the Civil Rights Act.

Both these cases are distinguishable from the case at bar. The Bowe case dealt with alleged discrimination on the basis of sex, whereas this case deals with a discrimination against the freedom of religion, one of the most cherished and protected constitutional rights. Washington involved a settlement agreed to by both sides, a far different situation than is presented in this case. Both decisions are now on appeal.

In addition to being distinguishable, these cases should be critically analyzed to determine whether their reasoning is valid. The reasoning given by the Bowe court itself argues against the decision in that case:

> "The court finds a fundamental difference between a claim for the violation of a collective bargaining agreement and a claim for the violation of the Civil Rights Act of 1964. The latter is a statutory embodiment of constitutional rights that all persons are entitled to enjoy, while the former has as its primary purpose the maintenance of industrial peace between labor and management. It is the belief of the court that an employee has the right to come before the court and assert his right under the Civil Rights Act of 1964 without regard to any contractual remedies also available to him." 272 F. Supp. at 337.

The doctrine of election of remedies has traditionally been applied in cases where the same or nearly identical issues were being pursued in two forums. See, e.g., Penn Gen. Cas. Co. v. Commonwealth of Pa., ex rel Schnider, 294 U.S. 189 (1935). This doctrine has also been used in

the labor field relative to proceedings both before an arbitrator and then before the National Labor Relations Board on the same issue. The standards set forth in Spielberg Mfg. Co., 112 NLRB 1080 (1955), and Raytheon Co., 140 NLRB 883 (1963), are instructive: (1) The factual issues before the arbitrator and the Board must be identical; (2) the hearing and evidence presented must deal adequately with all factual issues; (3) the arbitrator must have decided the factual issues involved before the Board; (4) the hearing must be fair and regular in all respects; (5) the decision of the arbitrator must be in accordance with the law.

The factor to be emphasized in the instant case is whether the arbitration hearing dealt with the same issues that are present in this proceeding before this court. The issues treated by the arbitrator were wholly different from the issues raised in this Civil Rights Action. The labor contract involved, Article XI, Section 2, Step 5, stated:

> "The arbitrator shall have authority to interpret this agreement for the purpose of settling the grievance, but he shall have no authority to add to or detract from, or change this agreement, or arbitrate wages for new changes, jobs, or production standards."

Under this provision of the contract, the arbitrator correctly limited himself to the contract language. At no time did the arbitrator deal with the issues present in this case, that is, the issues relevant to the Civil Rights Act and the First Amendment.

It is understandable that any union member would first proceed to raise any rights he felt were due him under the contract. Proceeding first through arbitration is in accord with federal labor law. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960). Plaintiff should not be penalized for first proceeding with his contractual remedies through the arbitration process, as preferred and indeed mandated by federal labor law. He should retain his rights to also bring a civil rights action. This reasoning

is especially justified in this case, where the employee was not represented by counsel at the arbitration hearing, although the company was, and where the union did not file a brief on behalf of the employee though the company filed a brief on its behalf.

Under all these circumstances, the arbitration award should not preclude an action in this court based upon a statute rather than the collective bargaining agreement. To hold otherwise would be to require the employee to have come to this court without attempting a settlement through the contractual processes, as preferred by the national labor law; plaintiff would also have been required to choose between two different remedies when both remedies are provided to insure that plaintiff's contractual, statutory and constitutional rights are protected. When rights of this type are involved, they outweigh the interest of the company-defendant in avoiding the inconvenience and expense of multiple actions. Thus, a trial should be held on the merits of plaintiff's claim that defendant has violated the Civil Rights Act.

II.

Defendant argues that the First Amendment does not apply to labor contracts or proceedings thereunder, because they are not actions of the government, but are rather purely private activities. Defendant further argues that even if the First Amendment could be said to apply to this situation, the decision of the arbitrator should be final and conclusive with respect to plaintiff's First Amendment rights.

Both defendant's arguments are invalid. First, the arbitration proceeding cannot be viewed as purely a private one. The National Labor Relations Act and the famous Triology cases[1] clearly establish a federal labor policy of arbitration as a substitute forum for the public judiciary in which to dispose of industrial disputes.

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[1] United Steelworkers v. American Mfg. Co., v. Warrior & Gulf Nav. Co., v. Enterprise Wheel & Car Corp., 363 U.S. 564 (1960).

Since the arbitration tribunal or arbitration proceedings are in many instances a substitute for traditional judicial remedies, it follows that the rules of due process and other constitutional protections must extend to the substitute proceedings lest the courts, through approval of arbitration agreements in arbitration proceedings, support proceedings which result in the deprivation of statutory and constitutional rights. If this grievance-arbitration system, which exists as a result of court approval, is permitted to dispose of disputes involving substantial rights without heeding constitutional protections, the courts will find themselves supporting and giving credence to decisions, which if rendered by the courts would be a violation of the free exercise of religion clause of the First Amendment or some other essential constitutional protection.

The courts cannot leave to the arbitrator final decisions regarding constitutional rights. This is especially true in the instant case, where the arbitrator was limited to the contract in rendering his decision.

This court is not limited by the contract, but also has before it the Civil Rights Act and the Constitution of the United States. The constitutional issue is not one which can be passed over lightly, as was done by the arbitrator in a sentence of two. The constitutional issue is whether defendant effectively denied plaintiff the right of his religion by conditioning plaintiff's right to work on his willingness to forego his religious beliefs or to compromise them by encouraging someone else to work on Sunday. An analogous choice of this type was found to be unconstitutional in Sherbert v. Verner, 374 U.S. 398 (1963), where a Seventh Day Adventist was forced to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand.

The court at this time is not expressing an opinion as to the validity of plaintiff's claims. The court is rather refusing to allow a decision by the arbitrator to be the final one with respect to plaintiff's constitutional rights. The right in question, freedom to exercise one's religion, is too precious to require plaintiff to accept an arbitrator's decision regarding it. Again, the guiding principle is

that plaintiff should not be penalized and should not be precluded from his rightful statutory and constitutional remedies because he followed the mandated practice under federal law of first submitting his dispute to the private grievance procedure.

For all these reasons the motion to dismiss is denied.

Dated: November 5, 1968.

(s) Noel P. Fox
District Judge

CLERK'S OFFICE
United States District Court
for the
Western Dist. of Mich.

There was entered on the docket Oct. 18, 1968 an order in accordance with opinion of the Court denying defendant's motion for dismissal.

Howard T. Ziel, Clerk
(s) G. E. Larink, Dep. Clerk

APPENDIX C

(In the United States District Court for the Western District of Michigan, Southern Division — No. 5889)

ORDER

At a session of said Court held at the City of Grand Rapids, this 18th day of October, 1968.

PRESENT: Honorable Noel P. Fox, District Judge.

THIS CAUSE came on to be heard on the Motion of Defendant for dismissal for failure to state a claim upon which relief can be granted for the reason that Plaintiff made a binding election of forums; and it appearing to the Court that, for the reasons stated in the Court's opinion, Plaintiff did not make a binding election and therefore,

IT IS HEREBY ORDERED that Defendant's Motion pursuant to F.R.C.P. 12(b) (6) is hereby denied.

Dated: October 18th, 1968.

(s) Noel P. Fox
United States District Court Judge

APPENDIX D

(In the United States District Court for the Western District of Michigan. Southern Division — No. 5889)

OPINION
(Filed June 6, 1969)

This is an action arising under Title VII of the Civil Rights Act of 1964, 42 USC §2000(e), which provides, among other things, for relief against religious discrimination in employment. The parties have stipulated to the facts, the most pertinent of which are set forth below.

Plaintiff, Robert Dewey, was employed by defendant at its Wyoming, Michigan plant on June 14, 1951, and held various jobs until he became a die repairman, which is the job he held at the time of his discharge on September 12, 1966.

Defendant's Wyoming facility is a "job type" plant which produces aluminum extrusions and billets on an order basis. Before 1964 the plant operated on a five-day weekly schedule. Because of increased business, during 1964 and 1965 the plant operated on a "five plus" days weekly schedule. This increased to "six plus" days by 1966, with numerous Sunday work schedules.

Plaintiff was a member in good standing of the U.A.W. Union, Local 277, which represents the production and maintenance employees of defendant's plant.

Before the 1960 Labor Agreement, overtime at the plant was performed on a voluntary basis, and under such circumstances scheduling of production was made impossible on certain overtime days. In 1960, and to the present time, the agreements have included a section giving defendant the right to set overtime schedules and make it compulsory for the employees to work such schedules unless they have a substantial and justifiable reason for not doing so. This section in the 1965 Labor Agreement is Article IX, Section 3:

"All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent."

The agreement also provides, in Article IX, Section 4, that overtime work shall be divided as equally as possible. If fewer than all qualified employees are needed, the number required is to be scheduled with the overtime chart, and if more employees are needed, they are assigned in the inverse order of their seniority.

In response to a Union objection to the compulsory overtime clause, defendant on September 20, 1965, issued an interpretation of the Labor Agreement which said in effect that any employee assigned to overtime could be relieved from that assignment by arranging for another qualified employee to replace him. This system has been utilized extensively.

Since December of 1961, plaintiff has been a member of the Faith Reformed Church, affiliated with the Reformed Church of America. After joining this church plaintiff never volunteered for Sunday overtime work, although he did volunteer for other days.

Plaintiff was scheduled to work overtime on Sunday, November 21, 1965, pursuant to the compulsory overtime provisions of the Labor Agreement. He refused to work because of his religious beliefs; he was given a verbal warning; and he was advised of the necessity of a seven-day operation and that a repetition of his conduct would lead to a disciplinary action under Plant Rule 11. This rule prohibits "absence from work without reasonable cause," and provides a three-offense progression of punishment, with discharge for the third offense.

On the next five Sundays which plaintiff was required to work, between January and August 1966, he instead obtained qualified replacements in the manner described, supra. But on August 28, 1966, when again required to work on Sunday, plaintiff refused to work because of his religious

beliefs and refused because of his religious beliefs to obtain a replacement. He told Jake Zagman, a fellow employee who had been serving as his replacement, that he would no longer ask Jake to replace him. Plaintiff was given a written warning of violation of Plant Rule 11.

There is no dispute that these religious beliefs of plaintiff are sincere. These beliefs were expressed by plaintiff to the defendant before the first time he refused to obtain a qualified replacement. Plaintiff honestly believes, as a part of his religion, that he should not work on Sunday, and that he also should not induce anyone else to work on Sunday.

Consequently, on the next Sunday which plaintiff was required to work, September 4, 1966, he refused to work or to obtain a replacement. He was given a written warning and a disciplinary layoff of three days. Plaintiff again refused to work on Sunday, September 11, 1966, and was discharged for violation of Plant Rule 11.

On all the above-mentioned Sundays there were several qualified die repairmen available to work, although defendant states that two of these men could not be compelled to accept such an overtime assignment, since it was outside their job classification.

Before plaintiff's discharge, defendant had taken disciplinary action as to a number of other employees who refused overtime work assignments on Sunday because of their religious beliefs, as well as disciplinary action against employees who refused overtime on days other than Sunday.

Plaintiff filed a grievance upon his discharge, but his grievance was denied at every step of the procedure, including arbitration. The arbitrator considered only the contract, and neither the Civil Rights Act nor the Constitution was before him. Plaintiff then proceeded to the Michigan Civil Rights Commission, which denied his complaint due to insufficient grounds. Plaintiff then filed a charge with the Equal Employment Opportunity Commission, which issued a letter to defendant stating that the Commission had determined that there was reasonable cause to believe that defendant had engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964.

This action was brought upon failure of conciliation efforts. In November of 1968, this court denied defendant's motion to dismiss, 291 F.Supp. 786.

These are the facts that have been established. Before stating the law and applying it to these facts, it is well to note the facts which have not been brought before the court. There is no evidence that defendant would suffer any hardship should plaintiff prevail in this case. There is no evidence concerning what the effects would be of an accommodation by defendant to the religious beliefs of plaintiff. Could defendant continue to operate on Sunday? Would production be affected? These questions, and others like them, remain unanswered even though the parties have been given ample opportunity to present evidence concerning facts which were not possible to stipulate.

Because an application of Title VII of the Civil Rights Act of 1964, 42 USC §2000(e) will permit the court to decide the case, it is not necessary to reach the question of whether plaintiff's constitutional rights have been violated.

Section 703(a)(1) of the Act, 42 USC §2000(e)-2(a)(1), provides:

> "It shall be an unlawful employment practice for an employer —
>
> (1) to . . . discharge any individual . . . because of such individual's . . . religion . . ."

The Act makes exception to this rule only in those instances where religion is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 USC §2000(e)-2(e). That exception has not been alleged, and clearly does not apply to the manufacture of aluminum extrusions.

To further the purposes of the Act, the Equal Employment Opportunity Commission was formed. 42 USC §2000(e)-4. The Commission was given power not only to aid the enforcement of the Act, but also to promulgate regulations consistent with the provisions and purposes of the Act. 42 USC §2000(e)-12(a). Regulation Section 1605.1 is directly applicable to this case:

"Section 1605.1 Observance of Sabbath and other religious holidays.—(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

Great weight should be given to this regulation, as the Supreme Court emphasized in Udall v. Tallman, 380 U.S. 1, 16 (1965):

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n. v. Aragon,* 329 US 143, 153, 91 L ed 136, 145, 67 S Ct 245. See also, e. g., *Gray v. Powell,* 314 US 402, 86 L ed, 301, 62 S Ct 326; *Universal Battery Co. v. United States,* 281 US 580, 583, 74 L ed 1051, 1054, 50 S Ct 422. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'." *Power Reactor Co. v. International Union of Electrical, etc.* 367 US 396, 408, 6 L ed 2d 924, 932, 81 S Ct 1529.

In considering the law to be applied, the effect of the labor-management agreement must be determined. The agreement prescribes a certain procedure for assignment of overtime and for disciplinary discharge. If the procedures provided are lawful, defendant would prevail. If they are unlawful, the fact that it is a labor-management agreement will not validate the procedures. An agreement which violates a provision of the federal constitution or of a constitutional federal statute, or which cannot be performed without violating such a provision, is illegal and void. *Ewart v. Bluejacket,* 259 U.S. 129, 138 (1922); *Connolly v. Union Sewer Pipe Co.,* 184 U.S. 540 (1902); 17 Am.Jur.2d, Contracts §165 (1964).

The issue is thus not changed by the existence of a contract. If the procedures used are discriminatory, the plaintiff is entitled to relief, notwithstanding the fact that the contract authorized the procedures.

In applying the law to the facts in this case, we are concerned with the answer to one question: is the enforcement, by discharge, of compulsory overtime on Sunday discriminatory when, solely for religious reasons, the person discharged refuses to work on Sunday or to obtain a qualified replacement?

The defendant argues that discrimination requires a rule which applies differently to different groups, and that the compulsory overtime provision applies equally to all employees. This argument is invalid, because it is entirely possible that while a rule may apply equally to all employees, it does not have an equal impact on them. The court should look beyond the fact of the rule to determine whether it is discriminatory. See, in another context, *Renjel v. City of Lansing*, 293 F.Supp. 301 (W.D. Mich. (1968).

Rules having uniform application but a discriminatory effect against an individual's religion have been struck down before. *Sherbert v. Verner*, 374 U.S. 398 (1963), is probably the leading case in this regard. In Sherbert the plaintiff was denied unemployment compensation benefits because she refused to work on Saturday because of her religion, and was therefore "unavailable for work." The law applied equally to all, but its impact was discriminatory as to Seventh Day Adventists, such as the plaintiff. In rejecting an argument similar to that made by the defendant in this case that the rule applies equally to all, the Supreme Court, through Mr. Justice Brennan, stated at pp. 403 and 404:

> "In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '*(i)f* the purpose or *effect* of a law *is to impede the observance of one or all religious* or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only

> indirect.' *Braunfeld v. Brown,* 366 U.S. 599, 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, *but the pressure upon her to forgo that practice is unmistakable.*" (Emphasis supplied.)

The facts of Sherbert are similar to a recent Michigan case, *Swenson v. Employment Security Commission,* 340 Mich. 430 (1954). Again a provision which was applied equally had a significant impact only on Seventh Day Adventists. The application of the provision was therefore struck down.

A final example of the fallacy of defendant's argument is *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624 (1943). All school children in West Virginia were required to salute the flag, a rule which on its face is not discriminatory. But saluting the flag was forbidden by the religious beliefs of some of the students. The Supreme Court declared such a rule to be unconstitutional.

In each of these cases, as in the case at bar, the uniform application of a rule or requirement was struck down because its effect, its impact, was discriminatory.

The compulsory overtime rule of defendant, coupled with the option to obtain a qualified replacement, is not discriminatory on its face, but this is only the first step. Is the rule discriminatory in its impact? To answer the question it must first be determined what "discriminatory" means. Two definitions in the religious context are suggested, one by *Sherbert v. Verner,* supra, and one by the Equal Employment Opportunity Commission guidelines, also discussed supra. The standards suggested by these definitions will be applied to the case at bar.

In relation to Sherbert, one might question its relevance, since in that case there was "state action," while in the instant case there is only private action. That distinction would be important if this opinion were dealing with whether defendant's overtime rule is unconstitutional. But the issue before the court is whether the defendant has violated a federal statute — a statute which restricts the activities of private employers and does not require "state action." The importance of Sherbert to this analysis is not

its holding on constitutionality, but its definition of discrimination — a definition which is equally valid whether employed to measure private or state action.

The religious discrimination in Sherbert is succinctly defined at 374 U.S. 404.

> "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning of one of the precepts of her religion to accept work on the other hand."

Thus, a rule which forces a person to choose between his religion and compensation benefits is penalizing him solely because of his religion.

Applied to this case, plaintiff has been forced to choose between his religion and his job. Such a choice limits plaintiff's free exercise of his religion, and is thereby discriminatory in its effect. Applying the principles of Sherbert, the rule of defendant should not be enforced against plaintiff.

It is not necessary to rest the decision entirely on the Sherbert doctrine, however. The guidelines of the Equal Employment Opportunity Commission make it very clear what duties vis-a-vis religious beliefs are imposed upon any employer. Those guidelines are a very reasonable interpretation of the statute, and are hereby adopted as defining the requirement of the statute that an employer not discriminate on the basis of religion.

The test set forth is a twofold one: (1) the employer must make reasonable accommodations to the religious needs of its employees; (2) unless such accommodation will cause undue hardship on the conduct of the employer's business.

The evidence does not establish that a reasonable accommodation to plaintiff's religious beliefs was made by defendant. When considering plaintiff's beliefs, it must be remembered that a fundamental part of them was that plaintiff could not ask anyone else to work on Sunday, because that would be as much a sin as working himself on Sunday. There is no dispute as to the sincerity of this belief.

Requiring the employee to obtain a qualified replacement may be some accommodation to those who do not approve of Sunday work, but it is no accommodation whatsoever to those who believe, as plaintiff does, that it is a sin to induce another to commit the sin of working on Sunday. As to this sincere religious belief of plaintiff, defendant has made no accommodation.

Moving to the second half of the Equal Employment Opportunity Commission test, the defendant has not demonstrated any undue hardship. As stated earlier, full opportunity was given for any and all relevant facts to be presented. Yet the only factor tending to show hardship was that ten years ago there was some difficulty scheduling production on Sunday. This is not the type of hardship envisioned by the guidelines:

> "Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualification during the period of absence of the Sabbath observer."

Dewey's case is just the opposite. There were always several available employees who could perform his work.

The other facts cited to show hardship by defendant are not part of the stipulated facts, and are not properly before the court.

Defendant alludes to the possibility that this exception would open the door to other exceptions not based on religion. This is pure speculation which is not supported by logic. Sherbert, supra, 374 U.S. at 407. Other exceptions are not authorized, indeed mandated, by federal law. There is no reason why an accommodation cannot be made relative to religious beliefs, and limited thereto.

Thus plaintiff prevails under both definitions of discrimination. The overtime procedures of defendant, as applied, violated the Civil Rights Act of 1964.

The fashioning of a remedy presents a serious problem, because a reasonable accommodation is better worked out by agreement of the parties than by fiat of the court. For

this reason, the only affirmative relief which will be awarded at this time is that plaintiff be returned to work, with back pay from August 1, 1967.[1]

As to further accommodations which should be made in accordance with this opinion, the parties are asked to reach a solution acceptable to all concerned. Such a solution might include the defendant's obtaining qualified substitutes or a shared overtime type of arrangement whereby the people who could not work Sundays would work overtime on other days of the week.

These are merely suggestions. The parties know which types of accommodations are best suited to their particular needs. It is also suggested that the union be a party to negotiations concerning an acceptable change in the contract, so that the contract will conform to the law.

The court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders are necessary to insure that the religion of defendant's employees is properly respected and fairly accommodated.

IT IS SO ORDERED.

Dated: June 6, 1969.

Noel P. Fox
District Judge

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[1] The guidelines became effective July 10, 1967. Before the defendant was not on notice as to the meaning of the statute. But in a reasonable time after the effective date an accommodation should have been worked out. August 1, 1967 is such a time.

APPENDIX E

(In the United States District Court for the Western District of Michigan, Southern Division — No. 5889)

OPINION ON MOTIONS FOR ENTRY OF JUDGMENT AND STAY OF JUDGMENT

(Filed July 25, 1969)

The parties to this suit are before the court for entry of judgment. The court's opinion ordered plaintiff to be reinstated, with back pay and full seniority, in his job with defendant.

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, defendant employer has moved for an order staying enforcement of this judgment pending disposition of defendant's appeal to the United States Court of Appeals for the Sixth Circuit, and for fixing an amount of a supersedeas bond required of defendant.

I. *Stay of Money Judgment.*

In support of its motion, defendant first characterizes the relief granted in this case as "essentially a money judgment." Defendant then claims a stay of such a judgment as a matter of right, if accompanied by giving a supersedeas bond, pursuant to Rules 62(d) and 73(d) of the Federal Rules of Civil Procedure. Contrary to defendant's characterization, this remedy obviously involves much more than a money judgment. Reinstatement of Mr. Dewey is to be ordered, and his rights enforced by a permanent injunction. Authority for such a remedy is provided in the statute as follows:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and

order such affirmative action as may be appropriate, which may include reinstatement * * *." 42 USCA §2000e-5(g).

The court found defendant in violation of the Act, and will proceed to fashion an effective remedy. See pages 8-11 of the court's opinion with respect to defendant's unlawful practices.

Defendant is entitled, however, to a stay of the money judgment for back pay, and this is so ordered.

II. *Stay of Reinstatement.*

Defendant is clearly not entitled to a stay of an injunction or injunctive type remedies as a matter of right. Rule 62(d) provides for stay of judgment and supersedeas bond pending appeal "subject to exceptions contained in subdivision (a) of this rule." That subdivision in turn refers to subdivision (c) for the particular rule on injunctions. This rule vests discretion in the court, sitting in equity, to stay an injunction pending appeal under such conditions it deems proper for protection of the rights of the adverse party. The court will therefore consider defendant's motion as addressed to its sound discretion, and will examine the remainder of its contentions in the light of insuring justice to the parties to this lawsuit.

Defendant urges the court to consider four factors in deciding whether to stay reinstatement: (1) whether defendant has made a strong showing that it is likely to succeed on the merits of the appeal; (2) whether defendant will suffer irreparable injury if no stay is granted; (3) whether a stay would substantially harm plaintiff; and (4) the public interest. Each of these points was, in identical or similar form, argued by the defendant in the trial of this case. Each was carefully considered at that time, and disposed of in the court's opinion.

As to point (1), defendant at this hearing sought merely to reargue its case. No new material was presented to the court. Defendant's former arguments do not, in this court's view, amount to a strong showing of success on appeal.

Point (2) was also, in substance, disposed of by the court's opinion in this case. The court found that defendant would suffer no "undue hardship," under the Equal Employment Opportunity Commission guidelines, by accommodating the religious beliefs of Mr. Dewey. The present contention that reinstatement will "irreparably harm" defendant can fare no better. For purposes of this motion, "undue hardship," and "irreparable harm" can be equated. Defendant presented no evidence of the former at trial, and the affidavit now submitted does not suffice to convince the court of the latter. Defendant's fears of injury continue to be anticipatory and based solely on speculation. The plant is not working overtime now and has not been for over eight months. Defendant's overtime schedule is entirely in the control of management. In addition, Mr. Dewey is not exempt from all overtime work. If overtime problems develop, the court has retained jurisdiction of this matter and its remedy is flexible. Accordingly, there is no hardship whatsoever to defendant in the immediate reinstatement of Mr. Dewey.

Answering point (3), the court is convinced that the only party to be irreparably harmed by a stay of this judgment would be plaintiff. Although he still has a source of income, the record shows that he is not making as much as he would were he reinstated with defendant. Occurring in one of the most inflationary periods in recent history, any wage loss involves added hardship. A stay would, in addition, threaten the skills of a die repairman. If such a skilled worker is kept from his trade, changes in modern technology lead rapidly to obsolescence of knowledge. Plaintiff also faces considerable hardship in the awesome task a person of his means faces when litigating against the corporate resources of a defendant such as Reynolds. A stay would further amplify the effective inequality of these parties. For these reasons, a stay would irreparably harm the plaintiff.

Defendant's final point concerns the public interest. Defendant foresees grave consequences to its labor bargaining position as a result of reinstating plaintiff. It argues that, because of these predicted consequences, the public interest coincides with that of the corporation. In essence, its posi-

tion is that avoiding indirect impact upon a large corporation is more consistent with public values than enforcing the constitutional rights of the individual before this court. The heart of this position is nothing more than institutional intransigence.

Defendant's position, framed as above, highlights one of the most important aspects of this case: the relationship of the individual to the overwhelming institutions of modern society. It is true that the corporation and other institutional forms are to a large degree responsible for the current prosperity of the United States. Institutions, however, often grow unsensitive to the human beings they encompass. Government itself has grown overwhelming. But we must not lose sight of the paramount rights of free individuals. Protection of these inalienable rights has been the cornerstone of national policy since the birth of this nation. The Declaration of Independence and the Fourteenth Amendment deal with the inalienable rights of individuals, not institutions. They reflect the basic theme that government and its organs are constituted by men to secure these rights to individual human beings. Congress had this in mind when it enacted Title VII of the Civil Rights Act in 1964:

> "We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is such that we refuse to treat him as if his rights and well being are bargainable." 2 U.S. Cong. Adm. News '64, at page 2517.

One of these inalienable rights is freedom of religion. The First and Fourteenth Amendment to the Constitution and the Civil Rights Act look to securing this right to a single human being.

Following this clear principle, this court believes the public interest in this case to be best served by enforcing the constitutional rights of plaintiff. This is a classic case in which the government of the United States is called upon to secure the rights of a single individual. Defendant's motion to stay reinstatement is hereby denied.

The court will retain jurisdiction of this matter to insure continued protection of plaintiff's rights and provide the flexibility of an open ended remedy should a significant change of circumstances occur, especially with respect to defendant Reynolds. The court is certain that all parties involved can approach this case with the kind of reasonableness that reasonable men can bring to the management of institutions in the economic structure, and will use every effort to reach and maintain an accommodation within the framework of this remedial scheme. It will, however, be present to mediate any disputes affecting matters covered by its decree in this case, and, if necessary to issue additional orders to protect all concerned.

It should be made clear to the parties that the decree and any further action the court may take thereunder extends to individual officers and employees of defendant Reynolds. If necessary, to insure justice, the union and its officers may also be made a party.

The court believes this form of remedy necessary and appropriate to insure justice in this action. It is within the inherent equity power of District Courts to fashion effective remedies to protect federal rights. *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218, 12 L.Ed.2d 256, 84 S.Ct. 1226 (1964). The Supreme Court has encouraged imagination and flexibility in providing remedies to make effective the Congressional purpose:

> "It is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded. And it is also well settled that where legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *J. I. Case Co. v. Borak*, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555 (1964).

It is to fulfill this duty that the relief in this case is granted.

Engaging in Unlawful Employment Practices 42 USCA §2000e-5(g).

Defendant argues that, in order to be subject to injunctive relief under 42 USCA §2000e-5(g), supra, page 2, the court must find specific intent or purpose to discriminate against Mr. Dewey. This is not what the statute requires, either for the substantive violation or the imposition of injunctive relief. Defendant's interpretation is consistent with neither the language nor purpose of the statute. Defendant has "intentionally engaged" and plans to continue to engage in practices which had the effect of the discrimination the Act forbids:

> "It shall be an unlawful employment practice for an employer —
>
> (1) to . . . discharge any individual . . . because of such individual's . . . religion . . ." 42 USCA §2000e-2(a) (1).

It intentionally and purposely discharged Mr. Dewey for failure to work Sundays or find a replacement, and would continue to do so if this relief is not granted. By this action, defendant has intentionally engaged in an unlawful employment practice within the meaning of the above provision. Furthermore, defendant's reading of the statute would serve to foreclose effective remedies for violation of this important statute. Congress intended to prevent discrimination when it passed this Act. It must also have intended to provide effective remedies to secure protection under its provisions. Defendant's discharge of plaintiff was found to be discriminatory, and as such, must be subject to the full impact of remedies Congress has chosen to effect its purpose.

Defendant also urges that a "good faith" violation of Mr. Dewey's rights does not render it liable to relief under 42 USCA §2000-5(g). Defendant cites *Richards v. Griffith Rubber Mills*, — F.Supp — (D.C. Oreg. 1969) as authority for this contention. This court feels that it must reject the rule adopted by the Richards court. The cases relied on there as basis for a "good faith" exception dealth with

governmental and official immunity, and should not be extended to provide an insulation for private activities based on private contracts. *Dodd v. Spokane County,* 393 F.2d 330 (9th Cir. 1968); *Pierson v. Ray,* 386 U.S. 547 (1967). Such a rule would, for reasons previously mentioned, effectively emaciate Title VII.

Dated: July 25, 1969.

(s) Noel P. Fox
District Judge

APPENDIX F

(In the United States District Court for the Western District of Michigan, Southern Division — No. 5889)

JUDGMENT GRANTING PERMANENT INJUNCTION, AND REINSTATEMENT, CREDIT FOR SENIORITY AND FRINGE BENEFITS, AND BACK PAY

At a session of said Court, held in the Federal Building in the City of Grand Rapids, Michigan, on the 25th day of July, 1969.

PRESENT: Hon. NOEL P. FOX, District Judge.

THIS CAUSE having come on for final hearing and the issues therein having been tried before the Court without a Jury and the evidence of all the parties hereto having been heard, and the Court having duly made findings of fact and conclusions of law in its Opinion rendered on the 6th day of June, 1969 in accordance with Rule 52(a) of the Rules of Civil Procedure,

NOW THEREFORE, on this 25th day of July, 1969, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the Defendant, Reynolds Metals Company, is ordered to reinstate the plaintiff, Robert Kenneth Dewey, forthwith, to the job classification he held at the date of his discharge, September 12, 1966, and that Plaintiff be reinstated with full seniority that would have accrued and inured to his benefit if he had not been discharged. FURTHER, that the Plaintiff be made whole upon reinstatement by receiving full credit for all fringe benefits that would have accrued and inured to his benefit if he had not been discharged.

2. The Defendant, Reynolds Metals Company, its employees, agents, servants, attorneys, and privies, and each of them are hereby permanently enjoined and restrained from requiring the Plaintiff, Robert Kenneth Dewey, to perform work for the Defendant on Sundays.

3. The injunctive relief provided in Paragraph 1 and 2 of the Judgment is granted in accordance with and pursuant to Title VII of the Civil Rights Act of 1964, Section 706(5)(g), 42 USC Section 2000e-5(g), and Rule 65(d) of the Rules of Civil Procedure for the United States District Courts, for the following reasons:

(a) In discharging Plaintiff, Defendant violated Title VII of the Civil Rights Act of 1964 in discriminating against Plaintiff because of Plaintiff's religion.

(b) In assigning Sunday overtime work to Plaintiff, Defendant failed to reasonably accommodate the religious needs of Plaintiff and Defendant has not demonstrated that undue hardship on the conduct of Defendant's business would result from accommodating Plaintiff's religious beliefs concerning his working on Sunday and concerning his inducing another person to work on Sundays.

(c) Reinstatement is a remedy specifically permitted by the Act and is necessary to avoid irreparable harm to the Plaintiff and such remedy will not cause undue hardship on the conduct of the Employer's business.

4. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff recover from the Defendant back pay. Said Judgment for back pay shall relate to a period of time from August 1, 1967, through and including the date of reinstatement. Said amount is determined to be $7,286.92 for that period of time from August 1, 1967, through June 6, 1969. Upon reinstatement of the Plaintiff, there shall be added to this amount, an amount which represents the Plaintiff's lost wages from June 6, 1969, to the date of reinstatement. Said amount shall be determined by subtracting the Plaintiff's actual income earned during said period of time from an income average of the income earned by the two employees in the die repair classification, one whose seniority is immediately senior to the Plaintiff, and one whose seniority is immediately junior to the Plaintiff for said period of time. In determining said income average,

no income earned on Sundays shall be included in arriving at said average.

5. The Court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders are necessary to insure that the religion of Defendant's employees is properly respected and fairly accommodated; and for the further purpose of providing the parties a forum in which to seek recourse should circumstances change with respect to the effect of reasonable accommodation of Plaintiff's religious beliefs upon the conduct of the Employer's production schedules and Management-Labor relations.

The reasons for retaining jurisdiction and for the injunctive relief are set out in the Court's opinion dated June 6, 1969 as follows:

> "Moving to the second half of the Equal Employment Opportunity Commission test, the Defendant has not demonstrated any undue hardship. As stated earlier, full opportunity was given for any and all relevant facts to be presented. Yet the only factor tending to show hardship was that ten years ago there was some difficulty scheduling production on Sunday. This is not the type of hardship envisioned by the guidelines:
>
> > 'Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualification during the period of absence of the Sabbath observer.'
>
> "Dewey's case is just the opposite. There were always several available employees who could perform his work.
>
> "The other facts cited to show hardship by Defendant are not part of the stipulated facts, and are not properly before the Court.
>
> "Defendant alludes to the possibility that this exception would open the door to other exceptions not based on religion. This is pure speculation which is

not supported by logic. Sherbert, supra, 374 U.S. at 407. Other exceptions are not authorized, indeed mandated, by federal law. There is no reason why an accommodation cannot be made relative to religious beliefs, and limited thereto.

"Thus plaintiff prevails under both definitions of discrimination. The overtime procedures of defendant, as applied, violated the Civil Rights Act of 1964.

"The fashioning of a remedy presents a serious problem, because a reasonable accommodation is better worked out by agreement of the parties than by fiat of the court. For this reason, the only affirmative relief which will be awarded at this time is that plaintiff be returned to work, with back pay from August 1, 1967.[1]

"As to further accommodations which should be made in accordance with this opinion, the parties are asking to reach a solution acceptable to all concerned. Such a solution might include the defendant's obtaining qualified substitutes or a shared overtime type of arrangement whereby the people who could not work Sundays would work overtime on other days of the week.

"These are merely suggestions. The parties know which types of accommodations are best suited to their particular needs. It is also suggested that the union be a party to negotiations concerning an acceptable change in the contract, so that the contract will conform to the law.

"The court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders

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[1] "The guidelines became effective July 10, 1967. Before then defendant was not on notice as to the meaning of the statute. But in a reasonable time after the effective date an accommodation should have been worked out August 1, 1967 is such a time."

are necessary to insure that the religion of defendant's employees is properly respected and fairly accommodated."

6. IT IS FURTHER ORDERED THAT enforcement of this Judgment shall be stayed for ten (10) days after entry of this Judgment.

NOEL P. FOX
District Judge

APPENDIX G

No. 19746

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Appeal from United States District Court for the Western District of Michigan

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ROBERT KENNETH DEWEY,
Plaintiff-Appellee,

v.

REYNOLDS METALS COMPANY,
Defendant-Appellant.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed June 4, 1970)

Before WEICK and COMBS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WEICK, Circuit Judge. The action in the District Court was brought under the provisions of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e.

Plaintiff's (Dewey's) claim was that he was wrongfully discharged by his employer, the defendant, Reynolds Metals Company (Reynolds), because of his religious beliefs, and he prayed for reinstatement with back pay.

Prior to bringing the action, Dewey filed grievances with Reynolds on the identical claim set forth in his complaint, under the provisions of a collective bargaining agreement entered into by Reynolds with Local 277, United Automobile Aerospace and Agricultural Workers of America, AFL-CIO (UAW), which was the bargaining representative of Reynolds' employees. Dewey was a member of UAW. The grievances were processed and resulted in their submission to a mutually agreeable arbitrator, who made an award denying them on June 29, 1967.

Contemporaneously with the submission of the grievances, Dewey made application to the Michigan Civil Rights Commission for issuance of a complaint against Reynolds, alleging discrimination on account of his religious beliefs.

The following is a Summary of Findings and Order of Dismissal, entered by the Commission on December 13, 1966:

> "The findings indicate that the claimant, despite due notice of overtime requirements by the company and the applicable Collective Bargaining Agreement provisions, continued to refuse to perform scheduled overtime work on Sundays and took the position that his right to continued employment while following his religious belief without interference was an absolute right.
>
> "The Commission has previously ruled that where the normal work week and foreseeable overtime requirements are prescribed in a Collective Bargaining Agreement, that absent or (sic) intent on the part of respondent to discriminate on religious grounds, an employee is not entitled to demand any alteration in such requirement to accommodate his religious beliefs.
>
> "The investigation did not reveal any intent on the part of the respondent to discriminate on religious grounds and it is, therefore, recommended that this application for the issuance of a complaint be denied for lack of probable cause.

ORDER OF DISMISSAL

> "The Commission has found insufficient grounds on which to issue a Complaint and, therefore, the above Application is herewith denied. This Order of Dismissal shall automatically become effective within 15 days from the date of mailing unless the Claimant shall demand a hearing prior thereto." (App. 93a-94a)

Dewey requested the United States Office of Federal Contract Compliance to review his charges of religious discrimination, and that office found no basis for a charge of discrimination.

On January 4, 1967, Dewey filed a charge with Equal Employment Opportunity Commission (EEOC), claiming religious discrimination. The Commission, on January 5, 1967, contrary to the recommendation of its Regional Director that the Commission find no probable cause, determined that there was reasonable cause to believe that Reynolds had engaged in unlawful employment practices and authorized the bringing of the present action in the District Court. Reynolds moved for dismissal of the complaint filed in the District Court on the grounds that the arbitrator's award was a final adjudication of the grievances and that they could not be relitigated. The District Judge, in a memorandum opinion, denied the motion to dismiss. 291 F.Supp. 786 (W.D. Mich. 1968).

Reynolds then answered, denying it discriminated against Dewey on account of his religion and pleaded provisions of the collective bargaining agreement which required employees to perform all straight time and overtime work required of them by the company. Reynolds further alleged that Dewey refused to perform overtime work on Sundays or to arrange for another qualified employee to replace him, basing his refusal on his religious convictions. Reynolds, after giving warnings and a three-days' layoff, finally discharged Dewey under its plant rules for his continued refusal to comply with the provisions of the collective bargaining agreement.

The parties stipulated the facts and the case was tried by the Court without a jury. In a memorandum opinion, the District Judge ruled in favor of Dewey. He ordered Reynolds to reinstate Dewey with back pay and enjoined Reynolds from requiring Dewey to work on Sundays. 300 F.Supp. 709 (W.D. Mich. 1969). The District Court refused to stay execution on the reinstatement pending appeal, and required Reynolds to post a $15,000-bond to stay execution on the judgment of $7,286.92 for back pay. 304 F.Supp. 1116 (W.D. Mich. 1969). Reynolds appealed. We reverse.

The applicable statute is 42 U.S.C. § 2000e-2(a), which provides as follows:

> "(a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . ."

The legislative history of the statute is clear that it was aimed only at discriminating practices. Congressional Record, Vol. 110, pages 13079-13080, June 9, 1964.

In order to prove a violation of the Act it was incumbent on Dewey to establish by a preponderance of the evidence that his employer discriminated against him on account of his religion. In 1964 U.S. Code Cong. & Adm. News, page 2515, it is stated:

> "A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal judiciary. . . . In addition, we believe that the employer or labor union will have a fairer forum to establish innocence since a trial de novo is required in all district court proceedings together with the necessity of the Commission

proving discrimination by a preponderance of the evidence."

On page 2516 it is stated:

> "Similarly, management prerogative and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices."

Reference to the collective bargaining agreement indicates rather clearly that the provisions with respect to straight time and overtime work apply to all employees equally and do not discriminate against Dewey or any other employee.

Reynolds operated a "job type" plant, producing, on order, aluminum extrusions and billets. It was necessary therefore for production to be scheduled to meet delivery dates provided for in contracts with customers.

Prior to the 1960 collective bargaining agreement, overtime was performed by employees on a voluntary basis. As a result thereof, with an increase in orders it became impossible to schedule production on Saturdays and Sundays. In order to remedy this difficulty, Reynolds negotiated with UAW the 1960 and 1965 collective bargaining agreements which provided that the company had the right to set straight time and overtime schedules and the employees were obligated to work such schedules unless they had a substantial and justifiable reason for not doing so. The 1965 agreement provided:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the Company except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent."

The agreement provided time and one-half for work on Saturdays and double time for work on Sundays.

The agreement further provided that overtime work shall be divided as equally as possible. If more employees are needed they are assigned in the inverse order of their seniority. Reynolds also issued an interpretation that any employee assigned to overtime could be relieved from the assignment simply by arranging for another qualified employee to replace him. This system was used extensively.

Dewey had been employed by Reynolds in various capacities since 1951, and at the time of his discharge, on September 12, 1966, was a die repairman. Since 1961 Dewey has been a member of Faith Reformed Church. He never volunteered for overtime work on Sunday after joining the church, although he did volunteer for other days.

Dewey was scheduled to work on Sunday, November 21, 1965. He refused to work because of his religious beliefs. He was given a warning and informed as to the necessity of a seven-day operation and was advised that a repetition would lead to disciplinary action under Plant Rule 11, which prohibits "absence from work without reasonable cause", and provides a three-offense progression of punishment with discharge for the third offense.

Between January and August, 1966, Dewey was scheduled to work on five Sundays. He obtained replacements as provided in the contract. On August 28, 1966, he was scheduled again to work on Sunday, and he not only refused to work but also refused to obtain a replacement on the ground of his religious beliefs. The arbitrator found:

> "(Dewey, it will be recalled, accelerated his disciplinary timetable by telling Zagman [a fellow employee] not to serve as a replacement any more.)"

On September 4, 1966, Dewey refused to work or to obtain a replacement. He was given a written warning and a disciplinary layoff of three days. Again he refused to work or to obtain a replacement on September 11, 1966, and was discharged for violation of Plant Rule 11.

We find nothing discriminatory in the provisions of the collective bargaining agreement or in the manner in which Reynolds executed it. In our opinion, it provided a fair and equitable method of distributing the heavy workload among the employees without discrimination against any of them.

The District Judge found that the compulsory overtime provision of the collective bargaining agreement "is not discriminatory on its face." We agree. However, he said this is only the first step. He found it was discriminatory in its impact. We disagree. He relied on *Sherbert v. Verner*, 374 U.S. 398 (1963); but this case involved state, and not private action.

In reaching his decision that the collective bargaining agreement discriminated against Dewey, the District Judge applied retroactively Regulation 1605.1, adopted by EEOC effective July 10, 1967; which was nearly ten months after Dewey had been discharged and after the arbitrator and the Michigan Civil Rights Commission had rejected Dewey's charges.

In our opinion, it would have been more appropriate for the District Court to have applied the EEOC Regulation 1605.1 which was in force at the time of Dewey's discharge, and which became effective June 15, 1966.

The 1966 regulation contained the following provisions which restricted any obligation upon the part of the employer to accommodate to the reasonable religious needs of his employees:

Section 1605.1(a):

> "(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he

requires that all his employees be available for work on Saturday."

Section 1605.1(b):

"(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

The 1967 regulation, retroactively applied by the District Court, omitted the above quoted language and other material parts of the 1966 regulation, and instead of providing definite guidelines for the assistance of employers who might be affected, left the matter largely on an *ad hoc* basis for the decision of the Commission on the particular facts of each case.

It is clear that Reynolds complied with the 1966 regulation. The obligations contained in the collective bargaining contract, which were lawful under the regulations of EEOC then in effect, ought not to be impaired by the application of a subsequently passed inconsistent regulation.

The District Judge took into account his *ex post facto* application of the 1967 EEOC regulation by starting Dewey's back pay from August 1, 1967, instead of from the date of his discharge; holding that this date was a reasonable time after the 1967 regulaton became effective for the company to work out accommodation to it. The trouble with this treatment is that Dewey was no longer in the employ of Reynolds. Having a lawful right at the time to discharge Dewey under the 1966 regulations, Reynolds ought not to be required to re-employ him at a later date and pay his back salary merely because EEOC decided to change the rule by adopting new, inconsistent regulations. The rights of Dewey and Reynolds were governed by the law

in effect at the time of the discharge. EEOC could not affect these rights by subsequently adopting a new regulation.

The Act further provides:

> "No order of the court shall require . . . the hiring, reinstatement or promotion of an individual employee, or the payment to him of any back pay, if such individual . . . was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3 (a) of this title." 42 U.S.C. § 2000e-5(g).

The reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union with his employer, which provisions were applicable equally to all employees. The violation consisted not only of his refusing to work on Sundays, but also his refusing to arrange for a replacement, which was an alternate procedure. He did arrange for five replacements, but later refused even to do this, claiming that it was a sin. He apparently did not regard it as sinful for him to collect wages from an employer who was compelled to schedule overtime production in order to meet its contractual commitments and eventually meet its payroll.

To accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining agreement among the employees, and could create chaotic personnel problems and lead to grievances and additional arbitrations. The practice of permitting the employee, rather than the employer, to secure the replacement served to insulate the employer against any charge of unequal naming of replacements.

But even if the 1967 regulations are applied, we think that Reynolds complied with Section 1605.1(b) thereof by making a reasonable accommodation to the religious needs of its

employees when it permitted Dewey, by the replacement system, to observe Sunday as his Sabbath.[1] He stubbornly refused to exercise this privilege. The finding of the District Court that Reynolds did not make reasonable accommodations to the religious needs of Dewey is not supported by substantial evidence and is clearly erroneous. Rule 52-(a) Fed.R.Civ.P.

The District Court referred to the inalienable right of freedom of religion, which he said is protected by the First and Fourteenth Amendments to the Constitution and the Civil Rights Act. The employer did not question Dewey's right to freedom of religion; Reynolds did question Dewey's right to practice his religious beliefs on it and to interfere with the operation of its plant.

An additional defense is provided in the first sentence of 42 U.S.C. § 2000-5(g), which provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice)."

This section of the statute requires a finding that the employer has intentionally engaged in an unlawful employ-

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[1] It should be observed that it is regulation 1605.1(b) and not the statute (§ 2000e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is *only* discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted.

ment practice before the court may award relief. *Richards v. Griffith Rubber Mills,* 300 F.Supp. 338, 341 (D. Ore. 1969).

It can hardly be said that Reynolds intentionally violated the Act when no discrimination was found by either the Michigan Civil Rights Commission, the Office of Federal Contract Compliance, the arbitrator chosen by agreement of the parties, or the Regional Director of the EEOC in Cleveland. In addition, in order to support his finding of an unlawful employment practice, the District Judge had to apply regulations adopted subsequent to the employee's discharge and ignore those in force at the time the alleged violation took place. The finding of the District Court that there was an intentional violation of the Act is not supported by substantial evidence and is clearly erroneous. Rule 52(a) Fed.R.Civ.P.

Effect of the Arbitration

It is clear that if the arbitrator of the grievances had granted an award to Dewey, instead of to Reynolds, the award would have been final, binding and conclusive on Reynolds. Reynolds would not have been permitted to relitigate the award in the courts. This is the teaching of the United Steelworkers trilogy, which clearly defined the respective functions of the courts and the arbitrator. *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 to 602 (1960); *Washington v. Aerojet-General Corp.,* 282 F.Supp. 517 (C.D. Cal., 1968).

In *Steelworkers,* the Court said:

> "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." (*Id.* at 569)

The arbitrator had jurisdiction to determine the grievances. The arbitration involved an interpretation of the collective bargaining agreement with respect to Dewey's claims that he had been laid off and discharged because of his religious beliefs. In arbitration proceedings, frequently questions of law and fact are resolved by the arbitrator. Where

the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration.

This result could sound the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street, *i.e.*, that the awards are binding on them but not on their employees.

The tremendous increase in civil rights litigation leads one to the belief that the Act will be used more frequently in labor disputes. Such use ought not to destroy the efficacy of arbitration.

In the supplemental brief of EEOC as amicus curiae, the case of *Smith v. Evening News*, 371 U.S. 195, 197-198 (1962), is cited for the proposition that "the complainant is not required to elect between his contractual rights or his statutory rights but may seek to vindicate his claim in contractual and statutory proceedings." (EEOC Supp. Brief, p. 3) The writer of the brief neglected to state that the collective bargaining agreement in *Evening News* contained no grievance arbitration procedure which had to be exhausted before recourse could be had to the courts. 371 U.S. 196, fn 1.

The question in our case is not whether arbitration and resort to the courts could be maintained at the same time; rather our case involves the question whether suit may be brought in court *after* the grievance has been finally adjudicated by arbitration.

We see no good analogy between jurisdiction of the National Labor Relation Board and that of EEOC. The Labor Board has adjudicatory powers over unfair labor practices, subject only to judicial review. Orders of the Board may be vacated on review only when they are not supported by substantial evidence upon consideration of the record as a whole. EEOC, on the other hand, has no such power. The District Court considers EEOC cases de novo. The legisla-

tive history, from which we have previously quoted, indicates the reason for the difference.

Nor do we find any national policy for ousting arbitrators of jurisdiction to finally determine grievances initiated by employees, based on alleged violation of their civil rights.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint.

COMBS, Circuit Judge, dissenting. I respectfully dissent. In my opinion the District Court correctly concluded that the company had not complied with Title VII of the Civil Rights Act in that it failed to make reasonable accommodation to Dewey's religious beliefs.

The Equal Employment Opportunity Commission was formed to further the purposes of the Act, 42 U.S.C. § 2000 (e)-4, and was granted power to promulgate regulations consistent with the provisions of the Act. 42 U.S.C. § 2000 (e)-12(a). The Commission's interpretation of the Act is persuasive although not binding on this Court. It was said in *Udall v. Tallman*, 380 U.S. 1, 16 (1965): "[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration," citing *Unemployment Commission v. Aragon*, 329 U.S. 143, 153 (1946); *Gray v. Powell*, 314 U.S. 402 (1941); and *Universal Battery Co. v. United States*, 281 U.S. 580 (1930).

Pursuant to its statutory authority, the Commission issued Regulation Section 1605.1, effective July 10, 1967, which provides, inter alia:

> "(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. . . .
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer

has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable."

As the majority opinion correctly points out, the 1967 Regulations were not in effect at the time of Dewey's discharge. However, the 1966 Regulations, which were in effect at that time, also provided that "the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodations can be made without serious inconvenience to the conduct of the business." It is thus apparent that the cornerstone of both the 1966 and 1967 Regulations is the obligation of the employer to accommodate the religious needs of employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

This is a reasonable interpretation of the Act. So, the test is whether the company has made reasonable effect to accommodate Dewey's religious beliefs. The only accommodation to which the company points, in addition to requesting volunteers, is the privilege extended to Dewey to obtain replacement for his Sunday overtime assignments. The majority views the existence of this privilege as a reasonable accommodation to Dewey's religious needs, and notes that "he stubbornly refused to exercise this privilege." This "stubborn" refusal on Dewey's part was grounded in his belief that working on Sunday is inherently wrong and that it would be a sin for him to induce another to work in his place. The replacement system was therefore a solution to Dewey's problem. There is a significant failure by the company to show that it could not have obtained a replacement for Dewey without hardship or inconvenience. There is also no showing that Dewey's failure to work himself or to obtain a replacement would have seriously disrupted work schedules or internal discipline. I find no support in the record for the assertion in the majority opinion that to grant Dewey's request would cause "chaotic personnel problems and lead to grievances and additional arbitrations." I think the company has

completely failed to show that Dewey's refusal to work on Sunday would create undue hardship on the conduct of its business.

Nor am I impressed with the argument that to grant Dewey's request would necessarily affect the company's contractual right to require overtime work. No evidence was adduced on this point. The company may not stand flat-footedly on its contractual right to require overtime work. Provisions of the contract must give way to constitutional mandates and valid statutory enactments. The First Amendment right to freedom of religion has always been recognized as one of the Bill of Rights' strongest mandates. Even though this right has not been extended into the field of labor relations, section 703(a)(1) of the Civil Rights Act is a Congressional directive that reasonable accommodation should be made by management to the religious beliefs of employees when this can be done without undue hardship on the employer. The District Judge did not apply the First and Fourteenth Amendments to the bargaining agreement here involved, but placed his reliance on Title VII of the Act and specifically stated that he did not find it necessary to reach the question whether plaintiff's constitutional rights had been violated.

Lastly, I am unable to agree that Dewey made an election of remedies by first pursuing the grievance procedure under the bargaining agreement and that he is thereby precluded from maintaining this action. Dewey's rights under the collective bargaining agreement and those created by Title VII of the Act are separate and distinct. The election of remedies doctrine therefore does not apply. See *Bowe v. Colgate Palmolive Company*, 416 F.2d 711 (7th Cir. 1969); *Bankers Trust Co. v. Pacific Employers Ins. Co.*, 282 F.2d 106, 110 (9th Cir. 1960). The Seventh Circuit held in *Bowe* that a plaintiff suing under 42 U.S.C. §2000(e) could "utilize dual or parallel prosecution both in court and through arbitration so long as erection of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment or windfall to the plaintiffs."

I would affirm the judgment.

APPENDIX H

(In the United States Court of Appeals for the Sixth Circuit — No. 19746)

ORDER

A majority of the Judges of this Court having voted against a rehearing en banc, it is ORDERED that the petition for rehearing be referred to the panel for final disposition. Judges Edwards and McCree voted in favor of a rehearing en banc.

Entered by order of the Court.

(s) Carl W. Reuss
Clerk

APPENDIX I

(In the United States Court of Appeals for the Sixth Circuit — No. 19746)

OPINION ON PETITION FOR REHEARING

Before WEICK and MCCREE*, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WEICK, Circuit Judge. It is contended that we have adopted a narrow construction of the Civil Rights Act and the Regulations adopted by EEOC thereunder. We submit that we have not. The legislative history of the Act expresses a clear Congressional intent to inhibit only discrimination against an individual because of his race, color, religion, sex or national origin. The plain language of the statute, Section 2000e-2(a) of Title 42, is susceptible of no other meaning.

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.

The collective bargaining agreement, by which *all* employees were obligated to perform straight time and overtime required of them by the company, was equally and uniformly applied to all of the employees, and it discriminated against no one.

To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede

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* Judge McCree was designated by the Chief Judge as the third member of the panel, to take the place of Judge Combs who resigned as a member of the Court on June 5, 1970, prior to the filing of the petition for rehearing. The designation was made in order that Judge McCree may file a dissent expressing his views.

to or accomodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. It is settled that the Government, in its relations with religious believers and nonbelievers, must be neutral. The Government is without power to support, assist, favor or handicap any religion. See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Everson v. Board of Educ.* 330 U.S. 1 (1947); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

In *Braunfeld v. Brown*, 366 U.S. 599 (1951), the Court upheld a state Sunday Closing Law against the contention that it operated to prohibit the free exercise of appellant's religion which observed Saturday as the Sabbath.

No one disputes Dewey's right to his religious beliefs. The question is whether he has the right to impose his religious beliefs on his employer and interfere with the operation of its plant. As Mr. Justice Douglas pointed out in his concurring opinion in *Sherbert v. Verner*, 374 U.S. 398 (1963), the religious beliefs of individuals may take on many forms. He mentioned specifically only a few, including Moslems, who attend a mosque on Friday and pray five times daily; Sikh, who carry a symbolic or regular sword; Quakers who affirm instead of swearing; and Seventh Day Adventists, who observe Saturday as Sabbath and eat only certain meats.

The arbitrator in his award stated that an employee might even join a religious organization which observed Wednesday as Sabbath.

It is argued that under EEOC Regulations the employer is required to make only reasonable accommodations to the religious needs of his employees. The employee may claim that all of his religious needs are reasonable, irrespective of discrimination, and file charges with EEOC against his employer for failure to accomodate them. An employer with thousands of employees could certainly be harassed by the filing of many of such claims. This would also present serious problems for labor organizations to cope with.

Congress did not intend that employers or labor organizations should be harassed with respect to claims not involving discrimination. In the legislative history of the Act it is stated:

> "Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." 1964 U.S. Code Cong. & Adm. News, at 2516.

The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.

Dewey entered the employ of Reynolds before he acquired his religious beliefs. The 1960 collective bargaining agreement was also entered into prior to that time. After he acquired his religious beliefs, his employer did endeavor to make accommodation to the religious beliefs of its employees by interpreting the agreement so as to permit any employee assigned to overtime to be relieved from the assignment simply by arranging for another qualified employee to replace him. We hold that this was a reasonable accommodation.

Dewey, with no difficulty, did arrange for replacements on five different occasions, and then he decided not only that it was a sin for him to obtain a replacement, but the arbitrator found specifically that Dewey told his replacement, Zagman, "not to serve as a replacement any more."

While it was stipulated that Dewey was sincere in his beliefs, he offered no proof that the tenets of his church forbade his designating a replacement to serve in his place on Sundays. The fact that he was sincere in his beliefs gave him no greater rights.

Moreover, the retroactive application of the 1967 Regulations to the 1966 discharge is justified by EEOC in its amicus brief, with the assertion that its Regulations are only "interpretations" and that "the timing of the Commission interpretations is irrelevant" since the 1966 Regu-

lation is now a "defunct Commission guideline." Although defunct in 1967, it was certainly in full force and effect in 1966 and authorized the employer to prescribe

> "the normal work week and foreseeable overtime requirements and absent an intent to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reasonable grounds to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

Dewey did not acquire his religious beliefs until after his employer had entered into the 1960 collective bargaining agreement which required all employees to work overtime. Dewey thus had actual knowledge that the requirements of the collective bargaining agreement would conflict with his subsequently acquired religious needs. Under the regulations in force at the time, which EEOC claims are now defunct, the employer was under no obligation to accommodate. There was no claim that the employer intended to discriminate on religious grounds. These regulations had the force and effect of law. Their subsequent repeal, after the discharge, ought not to affect the rights or obligations of either party.

The simple answer, however, to all of Dewey's claims is that the collective bargaining agreement was equal in its application to all employees and was uniformly applied, discriminating against no one.

Effect of the Arbitrator's Award

The case of *Culpepper v. Repnolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970), is relied on in support of the proposition that an employee may utilize both arbitration and an action under Title VII of the Civil Rights Act. In *Culpepper*, however, only a grievance was filed, which was never processed through arbitration. *Culpepper* involved racial discrimination, which a majority of the panel thought was so serious as to impose —

". . . the duty on the courts to make sure that the Act works . . ."

Circuit Judge Coleman, who filed a concurring opinion, disagreed rather vigorously that any such duty was imposed on the Courts. He stated:

> "Under our Constitutionally ordained form of Government, whether an Act works or fails is the concern of the Executive or Legislature, or both — not the courts."

We do not regard it as our function to enlarge on the plain language of a statute so as to impose on citizens obligations never intended by Congress, in order to make it work.

Great reliance is placed upon *Hutchings v. United Industries, Inc.*, ... F.2d ..... (5th Cir. 1970), which was decided after our decision in the present case was announced. In our opinion *Hutchings* does not comport with *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, ... U.S. ..... (1970), 38 U.S.L. Week 4462.

In *Boys Markets*, Mr. Justice Brennan emphasized the importance of arbitration in the settlement of labor disputes. He said:

> "However, we have frequently noted, in such cases as *Lincoln Mills*, the *Steelworkers Trilogy*, and *Lucas Flour*, the importance which Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as means to this end. Indeed, it has been stated that *Lincoln Mills*, in its exposition of § 301(a), 'went a long way towards making arbitration the central institution in the administration of collective bargaining contracts.'
>
> "The *Sinclair* decision, however, seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices.

> Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly effacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking." [footnote omitted].

Similarly, employers would be wary of arbitration clauses in collective bargaining agreements if, as in the present case, the arbitration is binding on them only and not on their employees.

Our case is even stronger than *Boys Markets* because the grievance here was submitted to arbitration and the arbitrator made an award which was final, binding and conclusive on the parties. It is as binding as a judgment. 5 Am.Jur.2d, ARBITRATION AND AWARD, § 147. It remains in full force and effect.

The amicus brief of NAACP Legal Defense Fund candidly recognizes that "[i]t may be true that the result of such an accommodation will be that the employer but not the employee will be bound by the decision of the arbitrator." (Brief, p. 14).

We know of no good reason why an award of an arbitrator should not be binding on both parties, the same as a judgment of a court.

It is difficult for us to believe that any employer would ever agree to arbitration of a grievance if he knew that the employee would not be bound by the result.

The importance of arbitration in the resolution of all labor disputes is the theme of the *United Steel Workers Trilogy*, 363 U.S. 564-602 (1960). The purpose of arbitration is thwarted if the awards are held by the courts to be binding on employers only and not on employees.

The petition for rehearing is denied.

McCree, Circuit Judge (dissenting). I would grant the petition for rehearing and affirm the judgment of the District Court for the reasons stated in the dissenting opinion of Judge Combs. Furthermore, I observe that in addition to the Seventh Circuit, *Bowe v. Colgate-Palmolive Co.*, 416

F.2d 711 (1969), the Fifth Circuit has held that appellee's invocation of the grievance-arbitration procedure did not bar him from proceeding in the District Court under Title VII of the Civil Rights Act. *Hutchings v. United States Industries, Inc.*, No. 28750 (5th Cir. June 19, 1970).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY,
Petitioner,
vs.
REYNOLDS METALS COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Reynolds Metals Company herewith opposes Petitioner Dewey's Petition for a Writ of Certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in this case on June 4, 1970 and on August 11, 1970, the latter being issued in response to a Petition for Rehearing.

OPINIONS BELOW

The opinion of the District Court denying Respondent's motion to dismiss (P.A. 9a-16a)* is reported at 291 F.Supp. 786. The opinion of the District Court ruling for Petitioner on the merits (P.A. 18a-28a) is reported at 300 F.Supp. 709. The opinion of the District Court denying a motion to stay execution (P.A. 29a-35a) is reported at 304 F.Supp. 1116. The opinions of the Court of Appeals, the majority holding for Respondent on the merits and remanding with instructions to dismiss the complaint (P.A. 41a-55a), are reported at 429 F.2d 324. The opinions of the Court of Appeals, the majority denying the petition for rehearing (P.A. 57a-63a), are reported at 429 F.2d 334.

STATUTE AND REGULATIONS INVOLVED

Sections 703(a)(1), 713(a) and (b) of the Civil Rights Act of 1964, (Title 42 USC Sections 2000e-2(a) (1), 2000e-12 a) and 2000e-12(b)):

Section 703(a)(1)
Title 42 USC Section 2000e-2(a)(1)):

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Section 713(a)
(Title 42 USC Section 2000e-12(a)):

> "(a) The Commission shall have authority from

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* This reference and succeeding references relate to page numbers in Petitioner's Appendices which are included with the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit dated September 30, 1970.

time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act."

Section 703(a)(1)
(Title 42 USC Section 2000e-12(b)):

"(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title."

Equal Employment Opportunity Commission Religious Discrimination Guidelines effective June 15, 1966 (31 F.R. 8370) and July 10, 1967 (32 F.R. 10298):

Equal Employment Opportunity Commission
RELIGIOUS DISCRIMINATION GUIDELINES
(Effective June 15, 1966)

"Section 1605.1 Observance of Sabbath and religious holidays.—(a)(1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular work week. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.

"(2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.

"(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

"Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated

to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur:

"(b) While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following guidelines may prove helpful.

"(1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another.

"(2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.

"(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

"(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such

an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."

Equal Employment Opportunity Commission
RELIGIOUS DISCRIMINATION GUIDELINES
(Effective July 10, 1967)

"Section 1605.1 Observance of Sabbath and other religious holidays. — (a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hard-

ship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Sixth Circuit correctly concluded that Respondent Employer's discharge of Petitioner from employment did not violate Title VII of the Civil Rights Act of 1964.

2. Whether the Court of Appeals for the Sixth Circuit correctly concluded that Respondent Employer reasonably accommodated the religious needs of Petitioner Employee within the meaning of the applicable Guidelines issued by the Equal Employment Opportunity Commission.

3. Whether the Court of Appeals for the Sixth Circuit correctly concluded that Petitioner Employee could not bring an action in a federal district court under the Civil Rights Act of 1964 after a grievance arising out of the same discharge has been adjudicated by arbitration under the provisions of the existing Labor Agreement.

STATEMENT

This is an action for money damages and reinstatement of position brought under Title VII of the Civil Rights Act of 1964, 42 USC §2000e, the Petitioner (Dewey) claiming that he was wrongfully discharged from employment by Respondent (Reynolds Metals Company) because of his religious beliefs.

Respondent is a corporation maintaining a "job type" plant in Wyoming, Michigan where it produces on an order

basis* aluminum extrusions and aluminum billets which find principal use in such industries as architecture, building, transportation, aircraft and missile. Paragraph 2, Stipulation of Facts (P.A. 1a). Prior to 1964 the plant was accustomed to operating on a five day weekly schedule. Due to an increase in business, during 1964 and 1965 the plant operated on a schedule that was described as "five plus" days which meant that the plant was operating on many Saturdays. This schedule was further increased in late 1965 and 1966 when the plant operated on a "six plus" days weekly schedule which meant that Saturdays were worked regularly and there were numerous Sunday work schedules. Paragraph 3, Stipulation of Facts (P.A. 2a).

The production and maintenance employees at Respondent's plant (which number included Petitioner) have been and continue to be represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (now known as UAW) and its Local 277 (hereinafter called the Union) with whom the Respondent had a Labor Agreement. As an employee of Respondent, and a Union member, Petitioner was at all times subject to said Labor Agreement. Paragraphs 4 and 5, Stipulation of Facts (P.A. 2a).

Prior to the 1960 Labor Agreement between Respondent and the Union, overtime was performed on a voluntary basis on the part of each employee. Because of employee

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* This is not a mass production plant in the sense that products are manufactured to stock or before they have been ordered. Rather, a product is produced after an order therefor has been taken making it necessary for Respondent to meet delivery dates which have been set by its customers. Obviously, it is necessary for Respondent to satisfy its customers on delivery dates if it is to stay in business. Therefore, in a very real sense in times of high business activity, such as heavy military procurement, difficulty in scheduling overtime would result in a great hardship on Respondent.

unwillingness to work on certain overtime days such as Sunday the scheduling of overtime production was made impossible on such overtime days. Paragraph 6, Stipulation of Facts (P.A. 2a). The 1960 Labor Agreement and subsequent Labor Agreements including that negotiated with the Union in 1965 reflected a different posture on the part of Respondent in that Respondent negotiated a section which both granted the right to Respondent to set overtime schedules and created the obligation on the part of the employees to work both straight time and overtime work required of them unless they had a substantial and justifiable reason for not doing so. The 1965 Labor Agreement also included therein the manner in which the overtime assignments were to be implemented. Such were to be divided as equally as possible in each job classification in each department; if less than all employees in a classification were needed, the number required were to be scheduled pursuant to the overtime equalization chart and when there were not sufficient employees obtained on such voluntary basis, then the overtime was to be assigned by Respondent among the qualified employees in the classification in the inverse order of their seniority. Paragraphs 7 and 8, Stipulation of Facts (P.A. 2a-3a).

There was also voluntarily issued by the Respondent, at the time the 1965 Labor Agreement was finalized in September 1965, an interpretation of the Labor Agreement which provided that an employee would be relieved of his obligation to personally work overtime if such an employee furnished a qualified substitute. This replacement system was necessary to retain the contractual principle that the overtime obligation remained with the employee. Such system has been used extensively since its establishment. Paragraph 9, Stipulation of Facts (P.A. 3a).

In addition to the Labor Agreement Respondent has also had in effect since 1957 Plant Rules which are posted on bulletin boards in each department. The Rules, including Plant Rule 11 which covers "absence from work without reasonable cause," provide for progressive discipline running from a warning for the first offense, one week layoff for the second offense, and discharge for the third offense. Under the provision of these Plant Rules, the Respondent does have the option of imposing a lesser penalty if circumstances so warrant. Paragraph 10, Stipulation of Facts (P.A. 3a).

Petitioner was employed by Respondent at its plant on June 14, 1951 and has held various jobs including that of die repairman, which was the job he held at his discharge September 12, 1966. Paragraph 1, Stipulation of Facts (P.A. 1a). Petitioner has been a member of the Faith Reformed Church since December 4, 1961. From December 4, 1961 until his discharge Petitioner has never volunteered for Sunday overtime work, but he has volunteered for overtime work on days other than Sunday during such period. Paragraphs 11, 12 and 13, Stipulation of Facts (P.A. 3a-4a).

Petitioner was scheduled to work overtime on Sunday, November 21, 1965 pursuant to the Labor Agreement. Petitioner refused because of his religious beliefs; he was given a verbal warning and at the same time was advised of the necessity of Respondent scheduling work on a seven (7) day basis and was told that a repetition of such conduct would result in disciplinary action under Plant Rule 11. Paragraph 14, Stipulation of Facts (P.A. 4a).

Thereafter, between January 1966 and up to but not including August 28, 1966, Petitioner was scheduled for overtime on at least five (5) Sundays pursuant to the

Labor Agreement. On each of said days Petitioner obtained replacements in accordance with the replacement system. Paragraph 15, Stipulation of Facts (P.A. 4a).

Petitioner was scheduled to work overtime on Sundays, August 28, 1966, September 4, 1966 and September 11, 1966 respectively but refused because of his religious beliefs. While Petitioner had expressed his religious beliefs against Sunday work to Respondent on prior occasions he had utilized the replacement system. On each of these three Sundays, however, he took the position that the obtaining of replacements was also against his religious beliefs. Petitioner also told one particular employee, who had served as his replacement on a number of occasions, that he would not request him to serve as his replacement again. Because of such refusal to work or to obtain replacements Petitioner was subjected to progressive discipline consisting of a written warning, a three (3) day layoff and finally discharge on September 12, 1966. Paragraphs 16, 17, 19 and 25, Stipulation of Facts (P.A. 4a, 5a and 6a).

On Sunday, August 28, September 4 and September 11 there were four (4), seven (7) and six (6) employees in the same classification as Petitioner who were qualified and not working who were available to Petitioner as possible replacements. There were also two (2) other employees, namely Zagman and Boyer, who were outside the classification but who were qualified, each of which was available on one of the Sundays in question. However, Zagman had been told by Petitioner that he would no longer ask Zagman to replace him. Paragraphs 16, 17 and 19, Stipulation of Facts (P.A. 4a-5a).

Prior to the discharge of Petitioner, Respondent had consistently applied the Labor Agreement and the Plant Rules

to employees who refused overtime work assignments on Sunday because of religious beliefs and to employees who refused such assignments on days other than Sunday for other reasons. This involved disciplinary action of varying degrees, running from warning to discharge depending on whether the violation was the first, second or third occasion. Paragraph 26, Stipulation of Facts (P.A. 6a-7a).

Pursuant to the Labor Agreement Petitioner filed grievances as to his three (3) day disciplinary layoff and protesting his discharge. The grievances were processed through the grievance procedure and in the final step thereof were submitted to an arbitrator who was mutually agreed to by the Respondent and the Union. In an Opinion and Award dated June 29, 1967, the arbitrator denied the grievances and sustained the disciplinary layoff and the discharge. Paragraph 27, Stipulation of Facts (P.A. 7a).

On September 16, 1966, which was a few days before Petitioner filed his grievance protesting his discharge, Petitioner filed an Application for the Issuance of a Complaint with the Michigan Civil Rights Commission alleging religious discrimination. On December 13, 1966, after investigation, that Commission issued a Notice of Disposition and Order of Dismissal stating the Commission had found insufficient grounds on which to issue a Complaint and application therefor was denied. Paragraphs 29 and 30, Stipulation of Facts (P.A. 7a). During the period subsequent to Petitioner's discharge and prior to January 1967 the United States Office of Federal Contract Compliance was invited to review the charges of discrimination alleged by Petitioner. That Office found no basis for a charge of discrimination.

On January 4, 1967, Petitioner filed a charge with the Equal Employment Opportunity Commission alleging dis-

crimination on a religious basis. On January 5, 1968 the Commission, contrary to the recommendation of the Regional Director of the Equal Employment Opportunity Commission for this area that no probable cause be found, determined there was reasonable cause to believe Respondent had engaged in unlawful employment practices under Title VII. Paragraphs 31 and 32, Stipulation of Facts (P.A. 7a and 8a). Conciliation efforts were made and thereafter Petitioner was notified by letter dated May 3, 1968 that he could institute a civil action in an appropriate Federal Court. Petitioner commenced the present action within thirty (30) days after the date of said letter, i.e., May 31, 1968.

Respondent moved for dismissal for failure to state a claim upon which relief could be granted for the reason that Respondent had made a binding election of forums. The District Court denied said Motion under date of October 18, 1968 (P.A. 9a-16a).

After a trial on the merits, the District Court rendered an opinion that the overtime procedures of Respondent violated the Civil Rights Act of 1964. The District Court based its decision on Guidelines issued by the Equal Employment Opportunity Commission in July 1967, which was ten (10) months after Petitioner had been discharged and also on *Sherbert* v. *Verner*, 374 U.S. 398 (1963), a case which involved state action (P.A. 18a-28a). Notwithstanding Respondent's motion for a stay of the judgment pending disposition of Respondent's appeal to the United States Court of Appeals for the Sixth Circuit, the District Court, under date of July 25, 1969, ordered the reinstatement of the Petitioner with back pay and enjoined Respondent from requiring Petitioner to perform work for Respondent on Sundays. The District Court did stay that part of the Judg-

ment ordering the payment of back wages in the amount of seven thousand two hundred eighty-six dollars and ninety-two cents ($7,286.92), upon the filing of a fifteen thousand dollar ($15,000.00) Supersedeas Bond, pending a final disposition of this cause on appeal (P.A. 29a-40a).

Pursuant to the order of the District Court, Petitioner was offered reinstatement to his former position effective August 22, 1969; reported for employment on August 25, 1969, and has been so employed to date.

Under date of June 4, 1970, following the submission of briefs and oral argument, a majority of the Court of Appeals for the Sixth Circuit reversed the District Court holding that: Petitioner's discharge was not discrimination on account of religion; the District Court more appropriately should have applied the 1966 Equal Employment Opportunity Commission Guidelines, with which Respondent complied, rather than the 1967 Guidelines which were issued ten (10) months subsequent to the discharge; the discharge was not on account of Petitioner's religion but rather because Petitioner violated the provisions of the collective bargaining agreement, which provisions were applied equally to all employees; and in any event Respondent had made reasonable accommodation to Petitioner's religious needs through the vehicle of Respondent's replacement system. In addition to its decision on the merits the Court also held that suit in such a matter should not be brought in court after the same subject matter has been finally adjudicated by arbitration.

Thereafter, in response to a petition, a majority of the Judges of the Court of Appeals for the Sixth Circuit voted against a rehearing *en banc*. Under date of August 11, 1970, a majority of the panel who heard the case (Judge McCree having been designated to take the place of Judge

Combs who resigned prior to the filing of petition for rehearing) denied the petition for rehearing holding that the collective bargaining agreement was equal in its application to all employees and was uniformly applied, discriminating against no one (P.A. 57a-63a).

ARGUMENT

I.

IN REQUESTING CERTIORARI, PETITIONER ERRONEOUSLY URGES UPON THIS COURT THAT THE COURT OF APPEALS' OPINION IS OF SPECIAL IMPORTANCE AS REGARDS THE ADMINISTRATION OF THE CIVIL RIGHTS ACT OF 1964.

Petitioner cites the case of *Jackson* v. *Veri Fresh Poultry Co.*, 304 F.Supp. 1276 (1969), an unappealed decision of the United States District Court for the Eastern District of Louisiana which held that the discharge of a Seventh-Day Adventist because of her refusal to work between sundown on Friday and sundown on Saturday was a violation of Section 703(a)(1) of the Civil Rights Act of 1964. Petitioner states that the decision of the Sixth Circuit Court of Appeals in the case before this Court is in conflict with *Veri Fresh Poultry, supra,* and affects the orderly administration of the Civil Rights Act of 1964.

Respondent asserts that the decision in the case below, while important to the parties, is not of significance in the present administration of the Civil Rights Act. The reasoning set forth hereafter also leads to the conclusion that *Veri Fresh Poultry, supra,* is likewise no longer a factor in the administration of the Civil Rights Act.

The court below found that Petitioner was discharged because he violated the provisions of his collective bargaining agreement entered into by his union with Respondent Employer, which provisions were applied equally to

all employees. The violation consisted not only of refusing to work on Sundays when his turn arose in accordance with his position on the seniority list, but also his refusal to arrange for a replacement, which was an alternate procedure well known to and used by Petitioner on prior occasions.

The above disciplinary action and discharge occurred in August and September of 1966. The Religious Discrimination Guidelines of the Equal Employment Opportunity Commission in force at the time of Petitioner's discipline and discharge, which were effective June 15, 1966, contained provisions which permitted Respondent's actions. Those Regulations said in part at Section 1605.1(a)(3):

> "However, the Commission believes that an employer is free under Title VII to establish a normal work week . . . generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees."

The same Regulations at Section 1605.1(b)(3) also authorized the employer to prescribe:

> ". . . the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

Section 713(a) of the Civil Rights Act authorized the Commission to issue Regulations and Section 713(b) thereof stated that reliance on such written interpretations shall

be a defense to any action based on any alleged unlawful employment practices.

In July 1967 the Equal Employment Opportunity Commission issued new Religious Guidelines and omitted both the above quoted language and other material parts of the 1966 Regulations. Instead of providing definite guidelines for affected employers, the Commission left the matter on an *ad hoc* basis for the decision of the Commission on the particular facts of each case (P.A. 48a).

The court below found that the Respondent complied with said 1966 Regulations in that Respondent established a normal work week generally applicable to all employees and that Respondent was under no obligation to accommodate Petitioner since Petitioner knew that the requirements of the collective bargaining agreement would conflict with his religious needs which were acquired subsequent to the time when Respondent negotiated the Labor Agreement which required employees to accept all work assignments. The court below held further that obligations contained in the collective bargaining agreement, which were lawful under Regulations of the Equal Employment Opportunity Commission then in effect, ought not to be impaired by the application of subsequently passed inconsistent regulations (P.A. 48a).

Thus, this cause of action occurring as it did in 1966, following the effective date of the 1966 Guidelines, required the application of such Guidelines. What a court might decide in a comparable factual situation arising subsequent to July 1967 is an entirely different question that requires application of the revised 1967 Guidelines which have remained in being to date of this writing. Consequently the decision in this case, which is predicated to a considerable extent on the 1966 Equal Employment Opportunity

Commission Guidelines, which Guidelines were revised in 1967 at a point in time after this factual situation arose, is of no particular significance as to causes of action arising after the issuance of the 1967 Regulations and accordingly is neither of great importance to the public at large nor to the orderly administration of the Statute. Consequently, certification should not be granted as requested by Petitioner.

II.

IN REQUESTING CERTIORARI, PETITIONER URGES UPON THIS COURT CONFLICTS, WHICH IN FACT, DO NOT EXIST.

Petitioner in attempting to establish grounds for certiorari under Supreme Court Rule 19, argues that the opinion below is in conflict with this Court's opinion, with decisions of other United States Courts of Appeals and with the interpretation of the Statute by the Equal Employment Opportunity Commission—the federal agency charged with the administration of the Civil Rights Act of 1964.

1(a) The first conflict is alleged to be with this Court's opinion in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), in which it was held that the denial of unemployment compensation benefits by the State of South Carolina to a Seventh-Day Adventist, who refused employment in a job requiring Saturday work, was unconstitutional in that it violated religious freedom as secured by the Free Exercise of Religion Clause of the First Amendment to the United States Constitution. Petitioner says the court below interprets the term "religion" as used in the Civil Rights Act as protecting only beliefs not practices while this Court holds "religion" as used in the First Amendment to extend beyond beliefs to practices or observances with some restrictions where public safety, peace or order is involved. Thus, asserts Petitioner, the decisions conflict. Without agreeing

with such a characterization of the opinion below, it is sufficient to say that in one case, *Sherbert, supra,* one is concerned with interpreting the Free Exercise Clause, which is intended to secure religious liberty in an individual by prohibiting any invasion thereof by civil authorities; while in this case one is involved with Title VII of the Civil Rights Act which, among other things, forbids religious discrimination in employment. The issue in *Sherbert, supra,* was free exercise of religion; the issue in this case is whether Respondent Reynolds Metals Company treated Petitioner Dewey in the same manner as everyone else in the administration of the Labor Agreement and not whether Petitioner can freely exercise his religion regardless of the Labor Agreement and regardless of how everyone else in the plant is treated. The nature of the rights subjected to judicial review are entirely different in these two cases. The term "religion" is used in two varying contexts, one being found in the Constitution and the other in the Civil Rights Act of 1964 and of necessity the word "religion" is subjected to a different interpretation in each of the contexts. There is no common ground; there is no conflict between the holding in *Sherbert, supra,* and the holding of the court below in this matter.

(b) The second example of conflict is said to be a conflict in principle between the decision of the court below and the decision of the Court of Appeals for the District of Columbia Circuit in *Barnett* v. *Rodgers,* 410 F.2d 995 (1969), wherein the issue was raised as to whether prison officials of the District of Columbia Jail were obliged to accommodate the religious dietary practices of prisoners who embraced the Muslim faith. Petitioner makes the assertion that the obligation of Respondent to select a substitute for Petitioner in certain work assignments is far more modest

than the requirements requested in *Barnett, supra,* i.e., one full-course pork-free diet once a day.

Barnett, supra, is predicated, as is *Sherbert* v. *Verner, supra,* on the First Amendment to the United States Constitution which, as interpreted in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) embraces two concepts: freedom to believe and freedom to act. This constitutional freedom to act gives rise to a possible obligation on the part of the District of Columbia Jail officials to accommodate the Muslim prisoners' religious dietary practices. Respondent submits that the Civil Rights Act of 1964 embraces concepts of nondiscrimination on a religious basis by an employer in terms of an individual's employment. It does not create a freedom to act as does the First Amendment in terms of practicing his religion at the expense of an employer. It does not permit an employee to refuse to work on a certain product, the nature of which might be objectionable for religious reasons; it does not permit an employee to leave his work for periods of time each day for religious purposes. The Civil Rights Act does mandate equal employment opportunity for all employees regardless of religion. The holding of the court in *Barnett, supra,* regarding the degree of official deference to religious obligations which may be owed to Muslim prisoners is based on First Amendment language, the requirements of which are entirely different from those found in the Civil Rights Act of 1964. Again, Respondent submits there is no conflict between *Barnett, supra,* and the holding of the court below.

(c) The third area of conflict is based on the decision of the court below in relationship to this Court's ruling in *Udall* v. *Tallman,* 380 U.S. 1 (1965) wherein it was said:

> "When faced with a problem of statutory construction, this Court shows great deference to the

interpretation given the statute by the officers or agency charged with its administration." (380 U.S. 16)

The court below found that the district judge applied the July 10, 1967 Regulations, which were adopted by the Equal Employment Opportunity Commission nearly ten months after Petitioner Dewey had been discharged, and ignored the June 15, 1966 Regulations, which permitted the establishment of a normal work week generally applicable to all employees, notwithstanding the fact that the schedule might not operate with uniformity in its effect on the religious observances of all employees; and also restricted any obligation to accommodate for religious needs if the employee knew the job requirements would conflict with his religious obligations. The Equal Employment Opportunity Commission, in an Amicus Brief presented to the court below, attempted to justify the retroactive application of the 1967 Regulations by asserting that its Regulations are only "interpretations" and that "the timing of the Commission interpretation is irrelevant" since the 1966 Regulation is now a "defunct Commission guideline" (P.A. 59a-60a).

The court below ruled that Respondent complied with the 1966 Regulations issued by the Equal Employment Opportunity Commission and found further that obligations contained in the collective bargaining agreement, which were lawful under the Regulations of the Equal Employment Opportunity Commission then in effect, ought not to be impaired by the application of a subsequently passed inconsistent regulation (P.A. 48a).

This Court has also ruled in *Udall*, 380 U.S. at 16, that the question of deference to the administrative agency is

even more in order when the construction of an administrative regulation is in issue:

> "[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous . . ." (380 U.S. 16, 17)

Plainly the application of the 1967 Regulations by the Equal Employment Opportunity Commission were erroneous; the court below has so held and rather than conflict as to *Udall, supra,* there is agreement.

Respondent also submits that on the strength of the above argument as to the application of *Udall, supra,* to this case, there is no conflict with the decision of the Court of Appeals for the Fifth Circuit in *Weeks* v. *Southern Bell Telephone and Telegraph Company,* 408 F.2d 228 (1969).

2(a) As a final argument relating to conflict, Petitioner refers to a conflict among the Fifth, Sixth and Seventh Circuit Courts of Appeals as to the concurrent jurisdiction problem that arises in Title VII cases, i.e., jurisdiction under the statutory scheme and under the grievance and arbitration system of a labor contract. The issue was raised in the decision of the court below; also in *Bowe* v. *Colgate Palmolive Company,* 416 F.2d 711 (7th Cir. 1969) and in *Hutchings* v. *United States Industries, Inc.,* 428 F.2d 303 (5th Cir. 1970).

While there is a difference in the holdings in the above cases as to the treatment to be accorded concurrent jurisdiction, Respondent submits that the issue is not material to this case. Petitioner had a full hearing in the District Court and thereafter on appeal the case was reviewed by the court below and a decision was given on the substantive issue as to whether there was a violation of the Civil Rights Act by Respondent (P.A. 41a-51a; 57a-60a). The further holding of the court below as to the procedural effect of

arbitration on the concurrent jurisdiction question did not in any way affect or detract from Petitioner's having a complete hearing on the merits. In a sense the holding of the court below as to the concurrent jurisdiction question is *dicta* because it in no way affected Petitioner's rights.

A different question would be before this Court if this case took on the posture of *Hutchings, supra,* wherein employee Hutchings was not given a hearing on the merits at the district court level and the question was sent to the Court of Appeals on the procedural question alone. Consequently, Respondent submits that this is not an appropriate case in which to review the concurrent jurisdiction controversy.

As an added reason for opposing the Petition for Writ of Certiorari on the basis of the concurrent jurisdiction question, Respondent respectfully submits to this Court that Senate Bill (S.2453) entitled Equal Employment Opportunities Enforcement Act of 1970, was approved by the United States Senate on October 2, 1970 by a vote of 42 to 24. This Bill, which is out of Committee in the House of Representatives and is awaiting action, grants to the Equal Employment Opportunity Commission power to enforce its decisions similar to other federal regulatory agencies, such as the National Labor Relations Board. Review of the Commission orders under this Bill may be had in a United States Court of Appeals as is the case under the provisions of the National Labor Relations Act, as amended. Assuming the above-mentioned Senate Bill passes the other House of Congress, and this is the type of enforcement provided by 34 of the 38 states with Equal Employment Opportunity laws, the question of concurrent jurisdiction as between the Federal district court system and the grievance-arbitration system of a labor contract

will be moot and the principle to be obtained from a decision of this Court would have no application to future cases.

CONCLUSION

For the reasons discussed above, Respondent submits that this Court should not grant the Writ of Certiorari requested by the Petitioner.

DATED:

Respectfully submitted,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

ROBERT KENNETH DEWEY, *Petitioner*

v.

REYNOLDS METALS COMPANY, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MEMORANDUM FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

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MEMORANDUM FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

THE INTEREST OF THE AMICUS CURIAE

This memorandum is filed with the consent of the parties by the National Jewish Commission on Law and Public Affairs, which is a voluntary association of attorneys and social scientists organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community in matters of public concern. The *amicus'* concern with this case—in which it filed briefs in the Court of Appeals—arises out of the importance of the legal

issues to Sabbath-observers throughout the country, and particularly to Orthodox Jews who are enjoined by Biblical command to "observe the Sabbath day to keep it holy" and "not [to] do any manner of work" on that day (*Deuteronomy*, V, 12, 14). In our view, Congress' prohibition against discrimination on account of "religion" in Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), was designed to secure the rights of individual employees to the free exercise of religious practices such as Sabbath-observance wherever such practices would not impose a demonstrable undue hardship on an employer. The majority of the court below has construed the Act to deprive the religiously observant of that right, notwithstanding the definitive interpretation given the Act by the federal agency charged with its administration and implementation. In our view, the holding below presents a grave danger to religious liberty in this country and warrants plenary consideration by this Court.

ARGUMENT

1. Because of the sincere religious beliefs, petitioner does not work on Sundays *and* will not ask another worker to substitute for him on that day. Solely as a result of his unavailability for Sunday overtime work and his refusal personally to request a fellow employee to take his place, he was discharged in September 1966 from employment at respondent's plant, where he had held a succession of jobs since June 1951. The principal issue in this Court is whether the discharge amounted to discrimination in employment because of petitioner's "religion," as that term is used in Section 703(a)(1) of the Civil Rights Act of 1964. A secondary issue—also important to the administra-

tion of Title VII of the 1964 Act—is whether petitioner's unsuccessful effort to obtain relief under the grievance procedure of a labor contract bars him from instituting a civil action in a federal district court pursuant to Section 706 of the Civil Rights Act. Both issues deserve plenary consideration by this Court, being of great importance to the adherents of Sabbath-observing faiths in this country as well as to all employees whom the Congress sought to protect by Title VII of the 1964 Act.

2. The factual context in which the case arises is spelled out in a stipulation appearing at pages 1a-8a of the petition. That stipulation establishes the following relevant facts:

(a) There is no dispute as to the sincerity of the religious convictions which prevent petitioner from working on Sundays or asking another employee to substitute for him. He notified respondent of his unavailability for Sunday work before the overtime assignments which led to his discharge (Pet. 6a, ¶¶ 24, 25).

(b) The labor contract between respondent and the union representing its employees provided for "compulsory overtime" upon assignment by respondent "except when an employee has a substantial and justifiable reason for not working." In September 1965, in response to a union objection—which apparently had nothing to do with observance of religious holy days—respondent issued a policy statement authorizing any employee who was assigned to an overtime shift to arrange for substitution by another qualified employee (Pet. 2a-3a, ¶¶ 7-9).

(c) When initially assigned to Sunday overtime shifts, petitioner made use of this generally available

substitution policy, but thereafter concluded that a request by him to a fellow employee that the latter work on Sunday would violate his religious beliefs (Pet. 4a-5a, ¶¶ 15-17).

(d) Petitioner volunteered for overtime work on days other than Sunday (Pet. 4a, ¶ 13).

(e) On none of the three Sundays when petitioner refused to work and refused to obtain a substitute was the overtime load so heavy as to require all eleven employees in his job classification to report for work. The number called on each of the days was seven, four and five, respectively (Pet. 4a-5a, ¶¶ 16, 17, 19).

(f) Respondent refused to request or direct the other employees in petitioner's job classification to substitute for him on any of the three Sundays on the ground that, in respondent's view, "this would result in a waiver of the compulsory overtime provisions of the Labor Agreement" (Pet. 6a, 23). There are no other facts in the record to show any hardship to respondent in the actual operations of the plant if it had undertaken the task of seeking and obtaining, from among available employees, a replacement for petitioner's Sunday overtime assignments.[1]

(g) Petitioner was discharged on September 12, 1966. Four days thereafter—on September 16, 1966—

---

[1] In addition to the three, six and five die repairmen apparently available on each of the three Sundays, there were also two other employees in different job classifications who were qualified as die repairmen and who could have substituted for petitioner on those days. (In fact, one of them had worked as petitioner's replacement, at his request, in the past.) Even assuming that respondent could not, under the labor contract, assign either of the two employees to this overtime shift against their will, there is no explanation in the record for respondent's refusal even to seek their voluntary cooperation.

he filed a civil rights complaint with the Michigan Civil Rights Commission. A week after his discharge—on September 19, 1966—his labor-contract grievance was received by respondent's personnel department (Pet. 5a, 7a, ¶¶ 20, 29).

(h) Less than a month after the State Commission rejected his complaint, petitioner filed a charge with the Equal Employment Opportunity Commission. While that complaint was pending in the Commission, his labor-contract grievance was submitted to arbitration and denied (Pet. 7a, ¶¶ 27, 30, 31).

3. These facts establish that respondent violated the applicable Equal Employment Opportunity Commission regulation, 29 C.F.R. § 1605.1, which interprets the Civil Rights Act's prohibition against employment discrimination on account of religion as requiring an employer "to make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business." In fact, respondent made no accommodation whatever to petitioner's strict observance of Sunday as a day of rest. In allowing petitioner to obtain a substitute for Sunday overtime assignments, respondent was according to petitioner only the same privilege it had granted, at the union's request, to all employees who wished to transfer out of overtime assignments for any reason whatever (or, indeed, for no reason at all). And by refusing even to request other available die repairmen to volunteer as substitutes for petitioner's Sunday assignments—with no reason given other than the insubstantial assertion that such conduct would amount to a "waiver" of a right held by the respondent under the

labor contract[2]—respondent manifested its rigid unwillingness to accommodate to the slightest degree to the "religious needs" of petitioner.

4. On petition for rehearing, the majority of the court below held that the interpretive regulations of the Equal Employment Opportunity Commission requiring accommodation by an employer to the Sabbath observance of his employees "are not consistent with the [Civil Rights] Act" (Pet. 57a). This holding substantially undermines the federal protection against religious discrimination incorporated in Section 703 (a)(1) of the Civil Rights Act and conflicts squarely with the rationale of this Court's decisions in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *In re Jenison*, 375 U.S. 14 (1963), where conduct required by an individual's belief was held to be within the protection of the First Amendment's guarantee of the "free exercise" of religion.

Nor does the Equal Employment Opportunity Commission stand alone in its view that Sabbath-observing minorities are entitled to protection against discharge or refusal to hire where accommodation to their religious practices would not impose undue hardships upon employers. As the Appendix to this Memorandum demonstrates (pp. 1a-6a, *infra*), the same policy

[2] The fact that an employer or a labor union is given a "right" under a collective-bargaining agreement does not entitle it to exercise that "right" in a manner inconsistent with Title VII of the Civil Rights Act of 1964 and its protections for individual employees. Compare, for example, *Local 53* v. *Vogler*, 407 F.2d 1047, 1054 (5th Cir. 1969); *United States* v. *Sheet Metal Workers*, 416 F.2d 123 (8th Cir. 1969); *United States* v. *IBEW Local No. 38*, 428 F.2d 144 (6th Cir. 1970), and authorities there cited. A contract between the employer and a union cannot grant to either of them "rights" which conflict with federal law.

has been adopted as to public or private employers in the States of Illinois, New Jersey, New York and Pennsylvania and in the City of New York. The decision below jeopardizes future efforts to obtain similar protection in local jurisdictions and thereby seriously threatens the free exercise of religion by many thousands of devout adherents to religious faiths throughout the country.

5. In both this case and in *Stimpel* v. *State Personnel Board,* 85 Cal. Rptr. 797, 6 Cal. App. 3d 206 (1970), now pending on petition for certiorari, No. 701, this Term, lower courts have sustained the discharge of individual employees who were unavailable for work one day a week on account of their religious beliefs, without *any* specific demonstration of how this absence caused *any* harm, much less "undue hardship," to their *employers.* And in opposing the petition for certiorari in *Stimpel,* the State of California has cited with approval (see Brief in Opposition, No. 701, p. 10) the decision of an intermediate New York court which held that an individual could be refused employment as a baggage clerk because his religious beliefs required him to wear a beard. *Eastern Greyhound Lines* v. *New York Division of Human Rights,* 311 N.Y.S. 2d 465. That decision is now on appeal, but it demonstrates how the position taken by the courts below in this case and in *Stimpel* results in the substantial erosion of rights secured by the First Amendment and the Civil Rights Act. For there is surely no less basis in the First Amendment to protect the adult who wears a beard for religious reasons than the school-child who wears a black armband for political ones. And in *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969), this Court held that the wearing of black arm-

bands by children could be prevented by school officials only on a showing that such a rule "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. (Even Justices Black and Harlan, dissenting from the result in *Tinker*, relied on the importance of maintaining school discipline and would apparently not have allowed the same restriction to be applied with respect to adults.)[3] Yet on far less of a showing of disruption or interference the respondents in this case and in *Stimpel*—as well as the bus line which is the employer in the New York case—have sought to prevent the free exercise of religion by their employees.

6. Dissenting in *Welsh* v. *United States*, 398 U.S. 333, 372 (1970), Mr. Justice White—speaking for the Chief Justice and Mr. Justice Stewart in addition to himself—observed that the Free Exercise Clause of the First Amendment "protects conduct as well as religious belief and speech." He noted that, "[a]lthough socially harmful acts may as a rule be banned despite the Free Exercise Clause even where religiously motivated, there is an area of conduct which cannot be forbidden to religious practitioners but that may be forbidden to others." The conduct involved here and in *Stimpel*—faithful observance of a weekly day of rest—comes squarely within that rule. In the present case, the Equal Employment Opportunity Commission has interpreted the applicable federal statute as in-

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[3] *Jackson* v. *Dodson*, 424 F.2d 213 (6th Cir. 1970), in which this Court denied certiorari on October 12, 1970, No. 355, this Term, is, of course, distinguishable because, as the Court of Appeals noted there, the record "does not disclose that the conduct of [the plaintiffs] and the length of their hair were designed as an expression within the concept of free speech." 424 F.2d at 217.

corporating the constitutional rule, thus making this an instance in which "free exercise values [have] prompt[ed] Congress to relieve religious believers" (398 U.S. at 373) of burdens which employers would seek to impose. The construction given to the statute by the court below frustrates this salutary objective, and it is most important that this Court clarify the law and governing principles before other members of religious minorities are subjected to similar discriminatory treatment.

7. A fundamental error committed by the majority below was its premise, stated in the initial decision and again in the opinion denying rehearing, that the rights of the parties were to be defined by "the obligations contained in the collective bargaining agreement" (Pet. 48a) which was said to be "equally and uniformly applied to all of the employees" (Pet. 57a). As a result of this error, the court below concluded that the contractual arbitration procedure for deciding disputes under the collective bargaining agreement was a total substitute for the remedy provided in the Civil Rights Act. That conclusion is erroneous for various reasons, the simplest of which is that petitioner's claim under the federal statute goes beyond the terms of the agreement and does not depend solely on whether the agreement was violated by his discharge.

The issue determined by the grievance arbitration was whether the union contract, which embodied the agreement between respondent and the union, prohibited the discharge of an employee who was unavailable for Sunday overtime work and who refused, for religious reasons, to obtain a substitute. If it did, petitioner was obviously entitled to relief under the contract. If it did not, petitioner was still entitled to pur-

sue his claim under the Civil Rights Act, since the protections given him by that Act cannot be denied him simply because respondent and the union agree in their contract that they may be denied. Hence the "award of [the] arbitrator" which the majority below believed should be "binding on both parties" (Pet. 62a) was not determinative of the issue now presented for judicial decision—even if, *arguendo*, it may be viewed as having bound all parties on the question whether the discharge violated the collective bargaining agreement.

As is demonstrated in the petition (pp. 9-10), the decision of the majority below on this aspect of the case conflicts squarely with decisions of the Fifth and Seventh Circuits, and the opinion below explicitly acknowledged a conflict (Pet. 61a). The issue is of major importance because, if the view of the majority below is not reversed, the rights granted by the Civil Rights Act will be abridged or defeated by agreements between employers and unions to insert similar provisions in their collective bargaining agreements.

CONCLUSION

This case and *Stimpel* v. *State Personnel Board*, No. 701, this Term, concern adherents to Christian sects who have lost their employment because of their observance of religious duties. The legal issues presented by these cases are also of major importance to thousands of Sabbath-observing Jews and faithful Moslems living in the United States—each of whom must observe one day in the week as a day of total rest. This Court recognized as long ago as *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940), that the Free Exercise Clause of the First Amendment encompasses a "freedom to act;" that freedom is safeguarded, as well, by the Civil

Rights Act of 1964. The decision below—as well as that in No. 701—effectively wipe out that cherished right. They do so not on the basis of any proof or demonstration in these records that the conduct involved—total observance of a weekly day of rest—is "socially harmful" or presents a "substantial threat to public safety, peace, or order," but simply on the assertion that the employer might "be harassed" if "many such claims" were filed (Pet. 58a) and on the erroneous premise that accommodation to religious requirements is neither constitutionally nor statutorily required (Pet. 59a). This Court should grant certiorari in both cases and, upon plenary consideration, clarify the legal obligations of public and private employers in the area of religious practices.

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APPENDIX

Illinois

The following guidelines on discrimination because of religious observance of the Sabbath and other religious holidays have been issued by the Illinois Fair Employment Practices Commission in accordance with Section 7 of the Illinois Fair Employment Practices Act (S. B. 609, L. 1961, as amended, Illinois Revised Statutes, Chapter 48, Section 857, Subsection 7). The guidelines are effective July 26, 1968.

> Several charges filed with the Commission have raised the question of whether it is discrimination because of religion for an employer to give job examinations at a time or day observed as the Sabbath by persons wishing to take the test, or to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath, or who observe certain special religious holidays during the year, and, as a consequence, do not work on such days.
>
> The Commission believes that the duty not to discriminate on religious grounds, required by Illinois Revised Statutes, Chapter 48, Section 853, Subsection 3(a) [Section 3, S. B. 609, as amended (Illinois ¶ 22,403)], includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer, or by the employee at some other time. The employee should possibly be able to rule out hardship even if another of similar qualifications cannot be found, if he himself agrees to do the necessary work either a day before or a day after the Sabbath, even by unpaid overtime, if necessary.

Examination and interviews for employment must be given at a time when they are available to all and not a time or place which will require a violation of one's religious observances and convictions.

Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

The Commission will review each case on an individual basis in an effort to seek an equitable application of these Guidelines to the variety of situations which arise due to the varied religious practices of the people of Illinois.

New Jersey

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January 10, 1968

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Brooklyn, New York 11201

Dear Messrs. Pesin and Rhine:

You have inquired as to the view of the Division on Civil Rights regarding the applicability of the employment sections of the New Jersey Law Against Discrimination to discrimination against employees who observe Friday evenings, Saturdays or any other day of the week as the Sabbath and, as a consequence, cannot work on such days. In making this inquiry, you have drawn our attention to

the recently promulgated guidelines of the Federal Equal Employment Opportunity Commission, dealing with religious discrimination relating to observance of the Sabbath and other religious holidays. These guidelines state that the employment section of the 1964 Federal Civil Rights Act "... includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." As an example of "undue hardship to the employer," the guidelines mention the situation "... where the employees needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." Finally, the guidelines provide that "... the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable."

The New Jersey Law Against Discrimination provides that it shall be an unlawful employment practice for an employer to refuse to hire or employ or to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because of an employee's or prospective employee's religious creed (N.J.S.A. 18:25-12 (f)). Employers, however, may establish and maintain bona fide occupational qualifications for employment positions, and may choose among individuals on the basis of competence, performance, conduct or any other reasonable standard (N.J.S.A. 18:25-2.1).

We recognize that ideally an employer would like to be able to call upon any of his employees to work at any time. On the other hand, the employee's or prospective employee's right to be free of religious discrimination includes the right to follow the usual religious observances of his faith. The problem, therefore, is to strike an appropriate balance between the needs of the employer for efficiency in operations and harmony among his employees and the needs of the Sabbath Observer to be employed and earn a livelihood without discrimination.

After full consideration of this matter, we have concluded that the approach taken by the Equal Employment Opportunity Commission represents a fair accommodation of these competing needs. The employment sections of the Law Against Discrimination demonstrate the strong public policy of this State against discriminatory employment practices, and in our opinion this policy requires some accommodation by the employer to the religious needs of his employees. We have concluded, therefore, that under the New Jersey Law Against Discrimination, sabbath observance is not a valid basis for refusing to hire or promote, discharging or otherwise discriminating against an employee, unless the absence of the employee will result in an undue hardship to the employer. Furthermore, the strong public policy of this State against discrimination in employment indicates that the employer must carry the burden of showing that he is unable to operate his business in the absence of any particular employee.

We believe that our acceptance of the guidelines of the Equal Employment Opportunity Commission will result not only in a fair accommodation between the needs of the employer and employee but will also lead to a desirable uniformity of coverage between the Federal and State civil rights laws.

The determination of what constitutes "undue hardship upon the employer" must of course be determined on a case by case basis. Please feel free, therefore, as particular applications of these guidelines are presented, to inquire of us concerning our view of the Law Against Discrimination.

Sincerely yours,

GEORGE S. PFAUS
George S. Pfaus
Director

GSP:mt

New York State

". . . I deem the Guidelines . . . as good and workable device in attempting to determine whether or not discrimination is involved. It is my opinion that if a guideline can be used throughout the United States it should be a basic minimum for New York State." *Rubin* v. *Metropolitan Life Insurance Company,* Case No. C-12725-66 (May 28, 1968) (Commissioner Robert J. Mangum)

New York City

COMMISSION ON HUMAN RIGHTS
STATEMENT TO EMPLOYMENT AGENCIES AND EMPLOYERS

(June 2, 1970)

The New York City law against discrimination on religious grounds prohibits the discharge or refusal to hire a person because of his religious practices, including practices with respect to observation of the Sabbath.

Under the law, it is the employer's obligation to accommodate to the religious needs of Sabbath Observing Jews and members of other faiths, such as Seventh Day Adventists, with special requirements.

In September 1969 [*New York Law Journal,* 9/11/69, p. 1], the City Commission on Human Rights adopted as a standard for cases under city law the guidelines on religious discrimination of the Federal Equal Employment Opportunity Commission. The federal guidelines require employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodation can be made without undue hardship on the conduct of the employer's business." The City Commission places the burden of proving "undue hardship" on the employer.

The federal standard has been used in a number of cases brought before the City Commission since September 1969. The EEOC Guidelines in full are as follows:

[Equal Employment Opportunity Commission guidelines are quoted]

These guidelines correspond to the letter and spirit of the New York City law against discrimination on religious grounds. They should be used by all employment agencies operating in New York City in all referrals to employers. This is consistent with the agencies' and the employers' obligations under the law.

Pennsylvania

Regulation No. 112, Pennsylvania Human Relations Commission (October 17, 1967)

OBSERVANCE OF THE SABBATH AND OTHER RELIGIOUS HOLIDAYS

Section 5(A) of the Law prohibiting discrimination because of religious creed includes an obligation on the part of an employer to make reasonable accommodation to the religious needs of employees and applicants for employment, who regularly observe Friday evening or Saturday or some other day of the week as their Sabbath, or who observe certain religious holidays during the year, and as a consequence, do not work on such days.

An employer will be expected to make such reasonable accommodations to the religious needs of such employees where same can be made without undue hardship on the conduct of the employer's business. The Commission will review each case on an individual basis in an effort to seek an equitable application of the provisions of this regulation.

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In the Supreme Court of the United States

October Term, 1970

ROBERT KENNETH DAVIS, PETITIONER

v.

DETROIT MARINE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY, PETITIONER

v.

REYNOLDS METALS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. 41a–55a) is reported at 429 F. 2d 324. Its opinion denying rehearing and rehearing *en banc* (Pet. App. 56a–63a) is reported at 429 F. 2d 334. The opinions of the district court (Pet. App. 9a–40a) are reported at 291 F. Supp. 786, 300 F. Supp. 709, and 304 F. Supp. 1116.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1970. A petition for rehearing was denied on August 11, 1970. The petition for certiorari was filed on October 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

409-222—70

QUESTIONS PRESENTED

1. Whether an employee, alleging employment discrimination prohibited by Title VII of the Civil Rights Act of 1964, waives his right to bring an action under that Title in federal district court by first pursuing the grievance-arbitration procedures of a collective bargaining agreement.

2. Whether an employer, subject to Title VII, may lawfully discharge an employee who refuses solely for religious reasons either to work overtime on Sundays or to find a qualified replacement when the employer has made no showing that his refusal to make a reasonable accommodation to the employee's religious beliefs is necessary for the safe and efficient operation of its business.

STATUTE AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> 42 U.S.C. 2000e–2
>
> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

The pertinent EEOC *Guidelines on Discrimination Because of Religion* are set forth in Appendices A and B, *infra*, pp. 11–15.

INTEREST OF THE UNITED STATES

The decision of the court of appeals may have a significant impact upon enforcement of federal rights under Title VII of the Civil Rights Act of 1964, as well as upon federal labor policy.

Title VII relies strongly on private court actions as a means of enforcing statutory rights against discrimination on the basis of religion, race, color, national origin, or sex. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400. Federal labor policy favors settlement of disputes arising under collective bargaining agreements through the grievance and arbitration procedures provided for in such agreements. The decision of the court of appeals, which requires that an employee must choose between grievance-arbitration and suit under Title VII, inevitably undermines one or both of these policies. The United States believes that the policies are complementary and that an election of rights should not be required.

Congress has also entrusted the Equal Employment Opportunity Commission and the Attorney General with important responsibilities for eliminating discriminatory employment practices. The court of appeals' refusal to recognize the responsibility of employers to abandon employment practices, not required by business necessity, which, although neutral on their face, have a religiously discriminatory effect, could adversely affect efforts of the federal government to cure all types of discrimination forbidden by Title VII.

STATEMENT

Petitioner was employed by the respondent company for fifteen years prior to his discharge in 1966. Beginning in 1960, labor agreements between the United Automobile Workers, of which petitioner was a member, and the company have included a provision giving the company the right to require employees to work overtime unless they have a substantial and justifiable reason for not doing such work. In September 1965, the company issued an interpretation of the agreement which allowed an employee to be relieved of an overtime assignment by arranging for another qualified employee to replace him.[1]

Petitioner, a member of the Faith Reformed Church since 1961, refused, because of his religious beliefs, to work overtime on Sundays or to ask anyone to replace him on that day.[2] As a result, he was laid off on September 4, 1966, and then discharged on September 11, 1966 (Pet. App. 4a–5a). He filed grievances because of his lay off (September 7) and discharge (September 19) (Pet. App. 5a). The grievances were denied at every stage of the procedure—and finally by an arbitrator on June 29, 1967.

---

[1] The collective bargaining agreement also provided for the processing of grievances and their arbitration.

[2] Although he refused to work himself, petitioner did find a qualified replacement on five Sundays between January 1966 and August 1966. Beginning on August 28, 1966, however, petitioner refused to find a qualified replacement for Sunday work. It was stipulated that this refusal, like his refusal to work himself, was "because of his religious beliefs," the sincerity of which was not challenged (Pet. App. 4a–6a).

Petitioner also complained to the Michigan Civil Rights Commission on September 16, 1966 (Pet. App. 7a). That commission denied his claim on December 13, 1966. Petitioner filed a charge with the Equal Employment Opportunity Commission on January 4, 1967. EEOC found reasonable cause to believe the Company had violated Title VII. After conciliation efforts had failed, petitioner brought this suit (Pet. App. 7a–8a).

The district court, relying primarily upon this Court's decision in *Sherbert* v. *Verner*, 374 U.S. 398, and the Commission's *Guidelines on Discrimination Because of Religion*, issued on July 10, 1967, 29 C.F.R. 1605.1 (App. A, *infra*, pp. 10–11), held that the company's discharge of Dewey constituted religious discrimination in violation of Title VII (Pet. App. 21a–27a). The district court rejected the contention that petitioner was precluded from suing under Title VII because he had pursued his rights under the grievance-arbitration procedure of the collective bargaining agreement (Pet. App. 11a–16a).

The court of appeals, with one judge dissenting, reversed and ordered the complaint dismissed. It ruled that suit under Title VII cannot be brought after a grievance has been finally arbitrated (Pet. App. 51a–53a). The court also reached the discrimination issue, however, holding that Title VII was not violated because the company discharged petitioner for violation of the provisions of the collective agreement, which applied equally to all employees, and not because of his religious beliefs (Pet. App. 49a).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that an employee waives his right to bring a court action to enforce rights against discrimination under Title VII of the Civil Rights Act of 1964 by seeking relief through a grievance-arbitration procedure which is completed prior to the filing of suit is in direct conflict with the decisions of two other courts of appeals. *Hutchings v. United States Industries, Inc.*, 428 F. 2d 303 (C.A. 5); *Bowe v. Colgate-Palmolive Co.*, 416 F. 2d 711 (C.A. 7); *Culpepper v. Reynolds Metals Co.*, 421 F. 2d 888 (C.A. 5). These decisions have correctly recognized that determinations under a grievance-arbitration process involve rights and remedies under a collective bargaining agreement which are distinct from those involved in judicial proceedings under Title VII, and that Congress has made the federal courts the final arbiter of an individual's rights under Title VII. See *Fekete v. U.S. Steel Corp.*, 424 F. 2d 331, 336 (C.A. 3).

An employee should not be forced to elect between his rights under a collective bargaining agreement

---

[1] The national labor policy favors the use of arbitration for resolution of disputes arising under collective bargaining agreements. See, *e.g., Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574. By converting invocation of the grievance procedure into a waiver of rights under Title VII, however, the election of rights doctrine imposed by the court below is likely to discourage the use of arbitration as a means of private resolution of problems of discrimination—and thus to undermine the effectiveness of anti-discrimination provisions in collective agreements.

and those under Title VII. Review by this Court is needed to resolve the conflict among circuits on this important issue, which affects the full range of rights to equal employment opportunities conferred by Congress in Title VII.

2. On the merits, the court below appears to rest fundamentally on the proposition that Title VII makes only a simple, direct discrimination unlawful. This narrow interpretation conflicts with a growing line of decisions of other courts of appeals holding that employment practices, regardless of whether they were adopted in good faith and are neutral on their face, are unlawful if they have a discriminatory effect and are not required for the safe and efficient operation of the employer's business. *E.g., Local 189, United Papermakers* v. *United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *Local 53 of Int. Ass'n of Heat & Frost & I & A. Workers* v. *Vogler*, 407 F. 2d 1047 (C.A. 5); *Griggs* v. *Duke Power Co.*, 420 F. 2d 1225 (C.A. 4), certiorari granted, 399 U.S. 926; *Jones* v. *Lee Way Motor Freight, Inc.*, 63 CCH Lab. Cas. ¶ 9504 (C.A. 10, No. 464-69, August 17, 1970); *United States* v. *Sheet Metal Workers Int. Assn. Local U. 36*, 416 F. 2d 123 (C.A. 8). This Court employed similar reasoning in *Sherbert* v. *Verner*, 374 U.S. 398, in holding that a State must show "some compelling * * * interest," 374 U.S. at 398, to justify denial of unemployment compensation under an ostensibly neutral statute to an individual whose religious beliefs forbade her from working on Saturdays. The holding

of the court below also conflicts with the EEOC *Guidelines* which have consistently required an employer to make reasonable accommodations to the religious needs of employees and prospective employees, and which place the burden on the employer to justify refusal to accommodate to a particular practice in terms of business necessity.[4]

There was no showing by the company in this case that its refusal to accommodate to petitioner's religious beliefs was necessary to the safe and efficient conduct of the business. In fact, the existence of the substitute policy suggests that the only effect on the conduct of the business which would be caused by accommodating petitioner's religious belief would be shifting to the company the administrative burden of obtaining (from among the company's own qualified employees) a Sunday replacement for him. Accordingly, and particularly in light of the need for review on the election of rights issue, review by this Court on the question of religious discrimination raised by this petition is warranted.

---

[4] The court of appeals held that the district court should have applied the EEOC *Guidelines* (App. B, *infra*, pp. 12–14) which were in effect in 1966, rather than those which became effective in 1967 after the petitioner's layoff and discharge. It held, however, that the employer had complied with both *Guidelines*. As Judge Combs pointed out in dissent, both require the employer to make reasonable accommodations to religious needs of employees "where such accommodations can be made without undue hardship on the conduct of the employer's business." Pet. App. 54a; see App. A, *infra*, pp. 11–12; App. B, *infra*, pp. 13–15.

The concept of "reasonable accommodation" also appears in the Commission's *Guidelines on Discrimination Because of Sex*, 29 C.F.R. 1604.1.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1970.

APPENDIX A

EEOC Guidelines on Discrimination Because of Religion (1967)

29 C.F.R. 1605.1 Observation of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employes who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required

accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people. (Sec. 713(b), 78 Stat. 265; 42 U.S.C. 2000e–12 [32 F.R. 10298, July 13, 1967].

APPENDIX B

EEOC Guidelines on Discrimination Because of Religion (1966)

29 C.F.R. 1605.1 Observance of Sabbath and religious holidays.

(a)(1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular workweek. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.

(2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate to the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.

(3) However, the Commission believes that an employer is free under Title VII to establish a normal workweek (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday. Likewise, an employer who closes his business on Christmas

or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur.

(b) While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following guidelines may prove helpful:

(1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another.

(2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.

(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alteration in such requirements to accommodate his religious needs.

(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as

to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees.

(Sec. 713(b), 78 Stat. 265; 42 U.S.C. 2000e–12) [31 F.R. 8370, June 15, 1966].

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY,
Petitioner,

vs.

REYNOLDS METALS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Does an employer engage in religious discrimination in violation of Section 703 (a) (1) of the Civil Rights Act of 1964 if he refuses to make reasonable accommodations to the religious observance of a weekly day of rest by an employee?

A. Reynolds Metals Company violated Section 703 (a) (1) of Title VII (42 USC 2000e-2(1)) by conditioning Dewey's continued employment upon his willingness to forfeit or otherwise compromise his religious beliefs.

B. Reynolds Metals Company did not reasonably accommodate Dewey's religious beliefs considering that Reynolds knew that Dewey's religious beliefs forbade Sunday work or the solicitation of a replacement, and further, considering the availability of other qualified employees.

C. Reynolds' otherwise discriminatory conduct of discharging Dewey for refusing to work on his Sabbath, is not rendered lawful because of the "bona fide seniority system" exception set forth in 703(h) of Title VII (42 USC Section 2000e-2(h).

D. Assuming Reynolds violated Title VII by discharging Dewey because of his religious beliefs, Reynolds' claim of "good faith" cannot deprive the courts of their power to shape and provide a remedy for this violation.

II.

Is an employee who has sought arbitration on his claim of wrongful discharge under the labor agreement is barred from bringing an action in a federal district court under the Civil Rights Act of 1964 arising out of the same discharge?

A. The doctrine of election of remedies is not applicable to a situation in which the Plaintiff enjoys two separate rights or causes of action.

B. Rights created under a collective bargaining agreement and rights created under Title VII are separate and distinct rights.

STATEMENT OF FACTS

Petitioner has been a member of the Faith Reformed Church since December 4, 1961 (41a, para. 11). His faith — the sincerity of which is not contested — prevents him from working on Sundays or asking anyone to work on Sundays in his stead (42a-43a, para. 16, 17 and 19). Petitioner was employed by respondent at its Wyoming, Michigan, plant since June 14, 1951, and held various jobs at the plant, culminating with the job of "die repairman," until September 12, 1966, when he was discharged (39a, para. 1). The work done at the plant is of a "job type," involving the production of aluminum extrusions and aluminum billets for industries such as architecture, building, transportation, aircraft and missiles (39a, para. 2).

Prior to 1964, the plant operated on a five-day-a-week basis. Subsequently, with increasing volume, the plant's operations were increased to six days a week, with overtime scheduled for a part of the employees on numerous Sundays (39a, para. 3). Under respondent's collective bargaining agreement with UAW, Local 277 (of which petitioner was a member in good standing), respondent had the right to set overtime schedules and compel employees to work overtime "except when an employee has a substantial and justifiable reason for not working." At the request of the union, respondent in 1963 issued an interpretative statement regarding this provision in which it announced that any employee assigned to overtime could be relieved of that assignment by arranging for another qualified employee to replace him. This system of substitution has been utilized "extensively" in respondent's plant since 1965 in many situations.

Petitioner was first assigned to Sunday overtime work on November 21, 1965, and he refused to work then because of his religious beliefs. He was admonished and told that a repetition of such conduct would lead to disciplinary action. On at least five occasions between January and August, 1966, petitioner was assigned to Sunday overtime work and obtained a replacement. On August 28, 1966, petitioner was again assigned Sunday work, and he refused to request a fellow employee to substitute for him on the ground that the making of such a request would violate his religious beliefs. The same sequence of events occurred with respect to Sunday assignments on September 4 and 11, 1966. On account of these absences, petitioner was discharged from employment on September 12, 1966, (42a-43a, para. 16, 17 and 19). Petitioner had volunteered for overtime on days other than Sunday (42a, para. 13).

In addition to pursuing various remedies under the labor contract and local civil rights statutes, petitioner filed a charge with the Equal Employment Opportunity Commission alleging that he was the victim of religious discrimination. The Commission (overruling a recommendation of a regional director) found that there was reasonable cause to believe that respondent had engaged in religious discrimination, and it instituted conciliation efforts. When conciliation failed, petitioner began this action in the district court, by filing his complaint based on §703 of Title VII of the Civil Rights Act of 1964 (42 USC §2000e-2 (a) (1)) (47a, para. 33).

On the merits, the district court held that respondent had violated Section 703 (a) (1) of the Civil Rights Act of 1964 by discharing petitioner on account of his refusal to work on Sunday or obtain a replacement (89a-103a). The court relied on the interpretative regulation issued by the Equal Employment Opportunity Commission, which requires employees "to make reasonable accommodiations to the religious needs of . . . employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. §1605.1 (b) . The court noted that, as in *Sherbert v. Verner*, 374 U.S. 398 (1963), the petitioner had "been forced to choose between his religion and his job." The court also found

that respondent had made "no accommodation whatsoever" to petitioner's religious belief that asking anyone to work on Sunday, in his place "would be as much a sin as working himself on Sunday" and that, under the applicable regulation, respondent had failed to demonstrate "any undue hardship" in accommodating to petitioner's request not to work on Sundays (97a-102a).

A majority of the court of appeals (Weick and O'Sullivan, J.J.) reversed on the ground that there was "nothing discriminatory" in respondent's conduct with respect to petitioner (128a). The majority judges viewed the application of the Equal Employment Opportunity Commission interpretative regulation as *ex post facto* since it was not issued until July 10, 1967 (131a). They also concluded that sufficient accommodation under the regulation had been made by respondent when it generally authorized the use of replacements — a privilege which, according to the majority, petitioner "stubbornly refused to exercise" (132a).

The majority also held that petitioner's district court action was barred because he had initially elected to pursue the arbitration remedy available under the collective bargaining agreement (134a-136a). Circuit Judge Combs dissented on the ground that the respondent had made "no showing" of disruption of work at the plant by accommodation to petitioner's demands and that the Commission's regulation required such an accommodation (136a-140a).

A timely petition for rehearing and suggestion for rehearing *en banc* were filed. Rehearing *en banc* was denied, with Circuit Judges Edwards and McCree dissenting (140a). Consideration of the petition for rehearing by the initial panel resulted in its denial, with the majority stating that "(t)he requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act" (141a). Circuit Judge McCree, (designated by the Chief Judge to substitute for Judge Combs, who had resigned since the original panel decision) dissented for the reasons stated in Judge Combs' opinion (141a).

ARGUMENT

I.

Does an employer engage in religious discrimination in violation of Section 703 (a) (1) of the Civil Rights Act of 1964 if he refuses to make reasonable accommodations to the religious observance of a weekly day of rest by an employee?

A.

Reynolds Metals Company violated Section 703 (a) (1) of Title VII (42 USC 2000e-(1)) by conditioning Dewey's continued employment upon his willingness to forfeit or otherwise compromise his religious beliefs.

Section 703(a)(1) (42 USC Section 2000e-3(a)(1)) provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) "To fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or".

From a reading of this Section of the Statute, there are two (2) initial steps which must be taken to determine whether there has been a violation; (1) Has the employer done some act, either failed or refused to hire or discharged an individual or otherwise discriminated against an individual and; (2) Was this act or other discrimination because of the individual's race, color, religion, sex or national origin?

In the instant case, there is no dispute that Reynolds discharged Dewey (43a, para. 19). The remaining question is

whether or not this act of discharging Dewey was because of his religion and therefore contrary to the statute.

Implicit in the language of the statute is a definition of discrimination which makes the discharge of an individual, because of his religion, discrimination prohibited by the statute.

There is no dispute that Dewey's religious beliefs are sincere (45a, para. 24); and there is no dispute that Dewey had made known his religious beliefs against Sunday work and against soliciting replacements to Reynolds prior to having been scheduled for the three (3) Sundays in 1966 (45a, para. 25).

Out of the eleven plus men qualified for die-repair, only Dewey was singled out and required to forego his religious beliefs in order to retain his job. No other employee in Dewey's job classification was required to make such a choice between his job and his religion.

Several recent cases have presented the Courts with circumstances in which an individual has been forced to choose between two rights or benefits. When an individual is forced to make the choice of exercising one right at the expense of another, he is penalized for exercising that right.

In *West Virginia, State Board of Education v. Barnette*, 319 US 624, 63 S Ct 1178, 87 L Ed 1628, this Court had before it a situation in which the individual's exercise of one right, the right to attend Public Schools, was conditioned upon the sacrifice of another right, the right to religious freedom. In the *Barnette* case, the West Virginia State Board of Education required that all school children salute the flag as part of their daily school routine. A student who did not comply with this requirement was subject to expulsion from the school system. The *Barnette* case involved a student whose religious beliefs forbade him to salute the flag.

In *Barnette*, this Court held that this requirement of the West Virginia State Board of Education, when applied to those students whose religious beliefs forbade saluting the flag, ran afoul of the Constitution.

Sherbert v. Verner, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965 (1963) involved the same type of "choice" as dis-

cussed above. In the *Sherbert* case, the Appellant had been denied unemployment compensation by the State of South Carolina because she would not accept employment on Saturday because of her religion. The State Unemployment Commission therefore determined that the appellant was ineligible for unemployment compensation because she was not available for work. In other words, the appellant's right to continue receiving unemployment compensation was conditioned upon her willingness to sacrifice or compromise her religious beliefs which forbade Saturday work. In holding that South Carolina's denial of unemployment compensation to the appellant was unconstitutional, this Court said:

> "Here not only is it apparent that appellant's declared ineligibility for benefits derived solely from the practice of her religion, but the pressure on her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand." (374 US 398, 404, 10 L Ed 2d 965, 970)

Later in the Court's opinion, again addressing itself to the matter of conditioning the exercise of one right or the continued receipt of a benefit upon the sacrifice or compromise of another, the Court said:

> "Likewise, to condition the availability of the benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." (374 US 398, 406; 10 L Ed 2d 965, 971)

The facts in a recent case before the Michigan Supreme Court were similar to those in the case of *Sherbert v. Verner*. In *Swenson v. Employment Security Commission*, 340 Mich 430 (1954), the Court had before it a case in which the Employment Security Commission of the State of Michigan had denied unemployment compensation to a member of the Seventh Day Adventist religion. The basis

for the disqualification of unemployment benefits was the refusal of Bessie Swenson (and others) to accept any employment involving Saturday work. For members of the faith of the Seventh Day Adventists, Saturday is their Sabbath and work is forbidden on this day. The Michigan Supreme Court, in approving the opinion of the trial Judge, in the *Swenson* opinion, quoted the opinion of the trial Judge as follows:

> To exclude such persons would be arbitrary discrimination when there is no sound foundation, in fact, for the distinction, and the purposes and theory of the act are not thereby served. Seventh Day Adventists, as a matter of fact, do not remove themselves from the labor market by stopping work on sundown Friday and not resuming work until sundown Saturday, as is apparent from the reason that employers do hire them." (340 Mich 430, 437, 438.)

Considering the above cited cases, and the numerous cases cited therein, it cannot be seriously doubted that conditioning the exercise of one right or the receipt of a benefit upon an individual's willingness to sacrifice another right, for example, his religious beliefs, is an invalid interference with the constitutionally and statutorily protected right of religious freedom.

Yet, notwithstanding all of the above cited authorities, Reynolds, in the instant case, argues that because it applied the rule of compulsory Sunday overtime for all employees uniformly, it cannot be guilty of an act of discrimination contrary to the Civil Rights Act of 1964.

In each of the above cited cases, as in the instant case, the uniform application of a rule or requirement was struck down because its *effects* were discriminatory; and in each case, the discrimination was on the basis of the individual's religious beliefs. It is true that in each of the cases discussed above, the rule which was struck down did not, on its face, discriminate, as for example, the requirement that Negroes sit in the rear of the buses would be discriminatory, or as for example, the requirement that Jewish students pay twice as much tuition in order to

attend a given school would be discriminatory. In the *Barnette* case, the school board required *every* student to salute the flag or suffer expulsion. In the *Sherbert* case and in the *Swenson* case, the State Unemployment Commissioners said that *everyone* must be willing to work Saturdays or be denied unemployment compensation. However, it was not the requirement itself that was discriminatory in these cases; but rather, the *effect* of the requirement that was discriminatory. It was only those individuals whose religious beliefs forbade flag saluting or Saturday work who were discriminated against. The discrimination, under these circumstances, results from exacting a penalty from those individuals who hold a religious belief which does not permit compliance with the uniformly applied rule.

The individual whose religious beliefs permit him to work any day of the week is not forced to make a choice between unemployment compensation or his religious beliefs. Similarly, the individual whose religious beliefs permit saluting the flag is not forced to make a choice between his education or his religious beliefs. For the individual whose religious beliefs permit compliance with the uniformly applied rule, there is no penalty exacted for compliance. However, the individual whose beliefs forbid Saturday work or flag saluting must make a choice, and regardless of the choice that he makes, he loses something.

Robert Dewey, in the instant case, holds religious beliefs which prevent him from working on Sunday, and likewise forbid him to solicit a replacement. The employer in the instant case, contends that it has the authority, under a Labor Agreement in effect since 1960, to require all employees to work overtime including overtime on Sunday. The employer exercised its authority to compel overtime by requiring Dewey to work on three (3) Sundays in 1966. Dewey's refusal to comply with this rule, as to overtime assignments on his Sabbath, resulted in his discharge. Under such circumstances, Dewey was faced with a choice; he could forfeit his right to continued employment, or he could forfeit or compromise his religious beliefs. Dewey followed his faith and was discharged from employment with Reynolds Metals Company.

While *Sherbert* was not a case involving the Civil Rights Act of 1964; but rather a case involving "the free exercise clause" of the Constitution, nonetheless, that case does establish an important principle applicable to cases dealing with the Civil Rights Act of 1964. This principle is the recognition by the Court in *Sherbert* of the fact that a uniformly applied rule may have unequal effects which unequal effects may render the rule invalid although uniformly applied.

This principle has been carried forward into the Civil Rights area. *Bing vs. Roadway Express, Inc.* 70 L.R.R.M. 3043 (N.D. Ga) (1968) in which the Court said that a seniority system might itself be discriminatory where accumlated seniority credits could not be transferred from the "standby class" where black workers had traditionally been situated, to the "on the road" class where whites predominated, even though there was no racial impediment as such to transfer from one class to the other. Both *Quarles vs. Phillip Morris, Inc.*, 279 F Supp 505 (ED Va 1968) and the *United Paper Makers and Paper Workers Local 189 v. United States* 416 F 2d 980 (1969) held that a seniority system violates the Civil Rights Act of 1964 if its effects are discriminatory even though it may appear fair on its face.

The concept of exacting a price from an individual for that individual's exercise of a right while no such price is exacted from another in the same class is discussed in a recent case, *US v. Local 189 United P & P AFL-CIO* CLC, 301, F Supp 906 (1969), affirmed, 5th circuit, 416 F 2d 980 (71 LRRM 3070). The *Local 189* case did not involve religious discrimination. However, in addressing itself to the concept of different treatment to members of the same class, where the different treatment is based upon the individual's race, the Court said:

> "Consistent with these two safeguards, however, removal of any structural impediments which delay the attainment by Negroes of jobs generally as good as those held by their white contemporaries or which require Negroes to pay a price for those opportunities

are required by law to be removed." 301 F Supp 906, 917 (1969).

In the instant case, it is agreed that Dewey was the only employee in the die-repair classification whose religious beliefs forbade work on Sundays and whose religious beliefs forbade him from soliciting a replacement in accordance with a replacement system (46a, para. 28). It is also agreed that on each of the occasions when Dewey was assigned to work on Sundays, notwithstanding his religious beliefs, there were from 4 to 7 qualified employees in die-repair classification whose religious beliefs did not forbid them Sunday work; and all of these employees were available for such overtime assignments. Notwithstanding all of that, Dewey was the only employee required to compromise or forfeit his religious beliefs or alternatively lose his job. Clearly, within the meaning of all of the aforementioned cases, the imposition of such a choice upon only one member of that classification is an act of discrimination based solely upon Dewey's religious beliefs.

Reynolds also argues that since its act of assigning Dewey to work Sunday overtime was pursuant to the Labor Agreement, that such conduct is immune from challenge under the Civil Rights Act of 1964. The argument that a contract between private institutions can vitiate or negate a fundamental right such as religious beliefs, protected by Congress in the Civil Rights Act, is inconsistent with the decided cases. The Court in *West Virginia Board of Education v. Barnette,* 319 US 624, 63 S Ct 1185, in addressing itself to the matter of fundamental rights such as freedom of religion, said:

> "One's right to life, liberty, property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights *may not be submitted to a vote;* they depend on the outcome of no elections." 319 US 624, 638, 63 S Ct 1178, 1185 through 1186 (Emphasis added.)

Aware of the evergrowing number of threats to the individual's fundamental freedoms in the Twentieth Cen-

tury, Congress passed the Civil Rights Act of 1964. As a result of the enactment of this law, such a fundamental right as freedom of religion has broader protection than previously. In passing the Civil Rights Act of 1964, Congress recognized that such a fundamental right as freedom of religion may be denied, not only by governmental action but also by the acts of private employers.

Reynold's act of discharging Dewey because he refused to work on his Sabbath when Reynolds knew that Dewey's religious beliefs forbade work on his Sabbath, and when there were several alternative employees who could have worked without violating their religious beliefs, is discrimination against Dewey on the basis of his religion.

This Court in the cases involving state restriction of the free exercise of religion has used an approach which balances the free exercise of religion rights against the state's interest in regulating the activity. *Sherbert v. Verner* illustrates this:

> "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations' Thomas v. Collins, 323 US 516, 530, 89 L Ed 430, 440, 65 S Ct 315." (page 407)

What the regulations promulgated by the EEOC obviously strive to do is to parallel this Court's approach in cases where state action restricts the free exercise of religion, in interpreting the Civil Rights Act of 1964 prohibition of discrimination on the basis of religion. The requirement that an employer accommodate an employee's religious needs if such accommodation does not create undue hardship requires an inquiry into the degree of employer hardship similar to the inquiry into the compelling state interest required to infringe the constitutional right

of free exercise of religion. And as *Sherbert* places the burden of showing the compelling state interest on the state, so the regulation places the evidentiary burden of showing undue hardship upon the employer.

The regulation is an appropriate interpretation of the Civil Rights Act of 1964 in using an approach similar to this Court's approach in the constitutional cases. Even though the statute speaks of discrimination on the basis of religion and the constitution provides for free exercise thereof, the similarity is that in each case religion is singled out for protection and the regulations are reasonable in finding that congress intended the same protection from employers in the Civil Rights Act as is provided by the constitution against government action.

The earlier regulation used the expression, "serious inconvenience" while the latter regulation uses "undue hardship." On the facts of this case, there is no different result; the facts show neither undue hardship nor serious inconvenience.

B.

Reynolds did not reasonably accommodate Dewey's religious beliefs considering that Reynolds knew that Dewey's religious beliefs forbade Sunday work or the solicitation of a replacement, and further considering the availability of other qualified employees.

As pointed out by the District Court in its Opinion (94a):

> "To further the purposes of the Act, the Equal Employment Opportunity Commission was formed. 42 USC 2000e-4. The Commission was given power not only to aid the enforcement of the Act, but also to promulgate regulations consistent with the provisions and purposes of the Act."

The District Court cited Section 1605.1 (c) of the Regulations regarding religious discrimination (95a):

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable".

This regulation essentially suggests a balancing of interests and consideration of alternatives when faced with a possible conflict between an employer's interests and the religious interests or needs of an employee or applicant.

While religious beliefs, in the sense of the intellectual thoughts are absolutely protected by the Constitution, the Courts have rejected the statement that all overt actions or practices, based upon religious beliefs, are free from restrictions. *Sherbert v. Verner*, 374 US 398, 402, 403, 10 L Ed 2d, 965, 970, 83 S Ct 1790. However, the Courts have held that when such fundamental rights as those guaranteed by the First Amendment are subjected to restrictions, it must be to prevent grave and immediate danger to the interests which the state may lawfully protect. *West Virginia's State Board of Education v. Barnette*, 319 US 624, 639, 63 S Ct 1178, 1186. Two recent cases demonstrate this point. The cases of *Leary v. United States*, 383 F 2d 851 (1967) and *United States v. Kuch*, 288 F Supp 439 (1968) involved a claim by criminally accused Defendants that their use of narcotics and other unlawful drugs was an essential aspect of their religious beliefs. The court, in upholding their convictions, discussed the principles of *Sherbert v. Verner*. The Court pointed out that while the constitutionally guaranteed right of free exercise of religion imposes upon the government the burden of showing a compelling state interest in its abridgment, in the cases of these narcotics users, the government had met this burden.

As Dewey has argued above, the fundamental religious freedoms guaranteed by the First Amendment are the same freedoms or interests which the Civil Rights Act of 1964 seeks to protect. Therefore, the reasoning applied by the Courts in the cases dealing with governmental action which affects or restricts religious freedom is applicable and rele-

vant to the Court's determination of the instant case involving an employer's abridgment of religious rights contrary to Title VII of the Civil Rights Act of 1964.

Whenever the Courts have dealt with a case involving a conflict between fundamental rights such as religious beliefs on the one hand, and a state interest on the other hand, two basic questions are always asked: The first question is, what is the purpose of the law or rule which abridges a fundamental right? The second question is whether that purpose or objective can be achieved in an alternative manner so as not to abridge or infringe upon the fundamental right. See *United States v. O'Brien,* 391 US 376, 88 S Ct 1679 (1968) 20 L Ed 2d 672.

United States v. O'Brien involved an individual accused of the crime of burning his draft card. In this case, the Court held, as unconstitutional, the statute passed by Congress which made it a criminal offense to burn a draft card. The Court pointed out that the free speech elements involved in the course of conduct of burning a draft card were sufficiently protected by the First Amendment to require an important governmental interest in regulating such conduct. The Court pointed out that there was not sufficient governmental interest shown to justify the restrictions upon the fundamental right of freedom of speech that is associated with the act of burning a draft card. The relevant point of the *O'Brien* case is that in striking down the statute, the Court noted that regardless of the purpose of the statute, the result of burning a draft card was already subject to criminal prosecution because after one burned his draft card, he would be in violation of the law requiring registrants under the Selective Service Act to be in possession of their draft card. In other words, the government could achieve its objective without abridging the right of free speech. The burden on the government to show a compelling or substantial interest in order to sustain the abridgment of some aspect of the freedom of religion was similarly discussed in *Sherbert v. Verner,* 374 US 398, 83 S Ct 1790.

The same reasoning that is set down in *O'Brien, Sherbert,* and other cases, is applicable to the relationship between the employer and the employee. The test is basically

one of comparing and balancing the interests of each party. Whenever a situation arises in which a fundamental right, such as religion which is protected by the Civil Rights Act, is in danger of being abridged as a result of some action or policy of an employer, the Court should determine what the employer's objective or interest is in compelling obedience to a particular company rule or other company policy. If an employee's fundamental right, such as his religion, is abridged by some act of the employer, it is only reasonable that the employer be required to alter his conduct if he can serve his interests in a manner that does not abridge the fundamental right of an employee. In other words, whenever a fundamental right such as one's freedom of religion is discriminated against or abridged, it first becomes the duty of the employer to accommodate the fundamental right of the employee by seeking a reasonable alternative means to achieve his objective.

Applying this analysis to the facts in the instant case, the first question is whether or not Reynold's requirement that Dewey work overtime on Sundays, or face expulsion, discriminated against, or abridges Dewey's religious beliefs. The answer to this question is quite evident. Dewey's religious beliefs forbade him from working on Sunday, the Sabbath of his religion, and those same religious beliefs forbade him from soliciting a replacement for such Sunday assignments. Since it was Reynold's requirement that Dewey either work on Sunday or find a qualified replacement, and since Dewey's religious beliefs forbade him from doing either, he was forced to compromise his religious beliefs or forfeit his job. The discriminating effects of Reynold's action are demonstrated by the fact that Dewey was the only die-repairman who was forced to ferfeit his job in order to follow his religious beliefs. Dewey was penalized for holding religious beliefs forbidding work on one day of the week.

Having determined that Reynold's action in compelling Sunday overtime will infringe upon Dewey's religious beliefs, the next step is to determine the employer's interest or objective in compelling Sunday overtime from the employee. The apparent answer to this question is that Rey-

nolds required the services of die-repairmen on the Sundays that it scheduled Dewey to work. The employer needed the services and skills of die-repairmen on these Sundays in order to maintain a production schedule. Thus, the next question is whether or not, in order to respect and safeguard the religious beliefs of Dewey, Reynolds could have achieved the production it sought to maintain on those Sundays without Dewey. In other words, what could Reynolds have done on these particular occasions to accommodate Dewey's religious beliefs?

One way in which Reynolds might have accommodated Dewey, assuming the employer needed an additional eight (8) hours work from a die-repairman would have been to require Dewey to work two (2) hours overtime for four (4) days during the week; or alternatively, four (4) hours overtime for two (2) days. Clearly, this is the one way in which Reynolds could have accommodated Dewey's religious beliefs, and at the same time Reynolds would have obtained the additional overtime which it required. However, the record does not show whether this could have been done. It should be noted that Reynolds never even attempted any accommodation.

A second alternative by which Reynolds could have accommodated Dewey's religious beliefs is a simple one. Examination of Paragraphs Nos. 16, 17 and 19 of the Fact Stipulation (42a, 43a, and 44a) filed herein reveals the following:

On the first Sunday that Dewey was scheduled to work overtime (August 28, 1966) seven (7) of eleven (11) employees in the die-repair classification worked. Therefore, there were *four* (4) other employees, qualified to do the work of a die-repairman, who were available to work on the first Sunday.

On the second Sunday that Dewey was scheduled to work overtime (September 4, 1966) four (4) of eleven (11) employees in the die-repair classification worked. Therefore, there were seven (7) other employees, qualified to do the work of a die-repairman, who were available to work on the second Sunday.

On the third Sunday that Dewey was scheduled to work overtime (September 11, 1966) five (5) employees in the

die-repair classification worked. Therefore, there were (6) other employees, qualified to do the work of a die-repairman, who were available to work on the third Sunday.

As appears in the Fact Stipulation, (46a, para. 28) no other employee in Dewey's classification held religious beliefs which forbade him from both working on Sunday and soliciting a substitute.

Paragraph No. 9 of the Fact Stipulation (41a) discloses that the employer issued an interpretation of the Labor Agreement of 1965 which permitted an employee to be relieved of an overtime assignment by arranging for another qualified employee to replace him. Reynolds contends that the system described in Paragraph 9 (41a) constituted reasonable accommodation of the religious beliefs of its employees. Perhaps this is true as to those employees whose religious beliefs did not conflict with such a replacement system, but it is not true as to Dewey.

There are two reasons why Reynold's interpretation of the Labor Agreement is not accommodation of Dewey's religious beliefs:

1. Reynolds contends that it should be the duty of the employee to find a substitute. However, it is against Dewey's religious beliefs to solicit such a replacement to work in his place.

> "Remember the sabbath day, to keep it holy. Six days shalt thou labor, and do all thy work; but the seventh day is a sabbath unto Jehovah thy God: *in it* thou shalt not do any work, thou, nor thy son, nor thy daughter; thy man-servant, nor thy maid-servant, nor thy cattle, nor thy stranger that is within thy gates;" (Exodus 20.8-10)

2. An employee has no power to direct another employee to work in his place. If no volunteers are forthcoming, the employer, under the Labor Agreement, can compel the employee to work the overtime required. Furthermore, the employer, and not the employee, has the authority to accept the services of a volunteer and determine that they are suitable for the job to be done.

At no time has Reynolds shown any reason why it could not have assigned overtime in such a manner that Dewey would not have been required on Sundays. At no time has Reynolds shown any reason why it could not secure a replacement for Dewey except the reason given as a defense in stipulation No. 23 (45a para. 23) and as set forth in Defendant's Answer No. 24 to Plaintiff's Interrogatory No. 24 filed herein. (27a)

Reynolds admits by implication, that it did not accommodate Dewey as indicated in its answer No. 24 to Plaintiff's Interrogatories (27a).

Plaintiff's Question No. 24 (22a) was "What is the Defendant's reason for refusing to find substitute employees to work overtime on Sundays so as to accommodate other employees' religious beliefs?" Reynolds answered (28a) ". . . If such were done for Dewey, as an accommodation, the same would have to be done for other employees who requested relief for various reasons in order to have impartial administration of the contract. . ."

However, it should be recalled that the Civil Rights Act of 1964 prohibits discrimination on the basis of religion; but the statute does not afford protection for the variety of excuses that the employees might urge upon the employer in an attempt to avoid overtime.

The defect in Reynold's position is the assumption that if it accommodates Dewey's religious beliefs, then it must accommodate other employees for *other* reasons. The Civil Rights Act of 1964 and the Regulations do not prevent an employer from abridging an employee's belief that he ought to play golf on Sunday. The Civil Rights Act of 1964 protects certain, specific fundamental rights including freedom of religion; golf for example, is not so protected.

Reynolds could still compel overtime work if it accommodated Dewey's religious beliefs. It could compel employees to work when they would not volunteer. The only restriction on the employer would be that it could not abridge or discriminate against its employee's rights protected by the Civil Rights Act.

In addition to the extra four (4), seven (7) and six (6) qualified employees who did not work on the re-

spective Sundays, Paragraph No. 22(a) and (b) of the Fact Stipulation (44a) reveals that there were two (2) additional employees, not in Dewey's classification who were also qualified to do the job of a die-repairman. While Reynolds could not compel either of these two (2) employees to work outside their classification on Sundays, it is clear that they were available for work, on a volunteer basis. Paragraph No. 22(a) of the Fact Stipulation (44a) states that the employee Jake Zagman did not work on September 11, 1966, and was available for work. Paragraph 22(b) of the Fact Stipulation (44a) states that William Boyer, subsequently reclassified into Dewey's classification, did not work on September 4, 1966 and was available for work.

A comparsion of the above-described means, by which Reynolds could have accommodated Dewey's religious beliefs, with the practice actually followed Reynolds, shows that Reynolds did nothing to accommodate Dewey's religious beliefs.

C.

Reynolds otherwise discriminatory conduct of discharging Dewey for refusing to work on his Sabbath, is not rendered lawful because of the "bona fide seniority system" exception set forth in 703 (h) of Title VII (42 USC Section 2000e-2(h).

Reynolds argued in the Court below that its conduct in discharging Dewey for his refusal to work overtime on his Sabbath is not a violation of Title VII, because such conduct falls in the scope of Section 703(h). This section provides an exemption, the substance of which is that it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions or privileges of employment pursuant to a *bona fide seniority or merit system* provided that such differences are not the result of intention to discriminate because of race, color, religion, sex or national origin. Typically, the context to which this exception was

intended to apply is a situation where a cutback in needed manpower occurs, and the most recently hired employees are laid off or fired.

Another common context with which the seniority system deals, is the situation where there are various advancements available and the opportunity to fill these vacancies is given to the employees with the greatest seniority first. These are the situations to which the exception was intended to apply and such is not the situation which exists in the instant case.

In the instant case, Dewey was not discharged because he was "low man on the totem pole"; but rather, he was discharged because of his religious beliefs.

Professor Alfred W. Blumrosen, of Rutgers University School of Law, was Chief of Conciliations for the U.S. Equal Employment Opportunity Commission 1965 through 1967, and has an extensive background in Civil Rights Law. In a recent article by Professor Blumrosen entitled "Seniority and Equal Employment Opportunity: A Glimmer of Hope" *23 Rutgers Law Rev.* 268 (Winter 1969), Professor Blumrosen discusses the Civil Rights Act of 1964, Title VII, and specifically the *bona fide seniority system exemption.* While his principal concern in this article is race discrimination, Professor Blumrosen states at *23 Rutgers Law Rev.*, 268, 290:

> "The evidence in a Title VII suit should not range over the 57 varieties of seniority in a given industry in disregard of the day-to-day operation of the particular system before the Court. If *that* system discriminates, then it is not protected by the 'bona fide' provision. It is no defense that a similar system might operate in a non-discriminatory manner."

Later at Page 291, Professor Blumrosen says:

> "What, then, does the 'bone fide seniority system' language mean? The proviso crystallizes the concern of Congress to protect earlier hired whites against later hired Negroes; and beyond that, it means only what it says: that it does not insulate seniority systems which operate in a discriminatory manner, . . ."

'The Fifth Circuit Court of Appeals, in affirming the District Court in *Local 189 v. U.S.*, 416 F 2d 980 (71 LR RM 3070) quoting from *Quarrels v. Phillip Morris, Inc.*, (E.D. Va. 1968) 279 F Supp 505, 217:

> "Section 703(h) expressly states the seniority system must be 'bona fide'. The purpose of the act is to eliminate any racial discrimination in covered employment. Obviously, one characteristic of a 'bona fide' seniority system must be a lack of discrimination." 416 F 2d 980, 988 (1969), 71 LRRM 3070, 3075.

Therefore, even if the facts in the instant case did lend themselves to 703(h) application, the effect of the application being discriminatory Reynolds cannot claim immunity from the charged violations on the basis of Section 703(h) because the system would not be bona fide.

The exception set forth in Section 703(h) is not applicable to the facts in the instant case. However, if the Court should consider that the exception is applicable to the facts in the instant case then Dewey contends that any seniority system which has as one of its effects religious discrimination is not a *bona fide seniority system;* and therefore Reynolds is not entitled to claim the immunity provided by Section 703(h). For all of these reasons, the argument that the Section 703(h) exemption applies to the instant case must be rejected.

D.

Assuming Reynolds violated Title VII by discharging Dewey because of his religious beliefs, Reynolds' claim of "good faith" cannot deprive the courts of their power to shape and provide a remedy for this violation.

Reynolds argued that if the Court found that Reynolds did violate Title VII of the Civil Rights Act in discharging Dewey, that such a violation was in "good faith" reliance on the Labor Agreement between employer and UAW and therefore employee-Dewey is not entitled to injunctive relief, back pay or reinstatement. What Reynolds is urging

upon the Court is that even if the Court finds that Dewey's rights were violated contrary to Title VII, it cannot afford any meaningful remedy if the Court finds that Reynolds relied on the Labor Agreement. In support of this contention, Reynolds cites Section 706(h) of Title VII and argues that it is necessary that the employer *intentionally* engaged in an unlawful employment practice in order to enjoin such practice or afford other affirmative relief.

In addition to the discussion in Professor Blumrosen's article set forth above, Professor Blumrosen refers to the word *intent* in the remedial section of Title VII:

> "The word 'intent' was inserted into the remedial section of Title VII as part of the 'Dirksen Amendments' which constituted the Senate-House compromise bill which was enacted into law. Senator Humphrey called this edition a 'clarifying change'. He said:
>
> 'Since the title bars only discrimination because of race, color, religion, sex or national origin, it would seem already to require intent, and thus, the proposed change does not involve an substantive change in the title. The express requirement of intent is designed to make it wholly clear that *inadvertent or accidental discriminations* will not violate the title or result in entry of court order. It means simply that the Respondent must have intended to discriminate.' " (emphasis added) *23 Rutgers Law Rev* 268, 282

Further, Professor Blumrosen states:

> "Thus, the intent requirement in Title VII is the intent requirement of a civil action in tort — that the Defendant be aware of the consequences of his action which are reasonably certain to flow from his behavior. If he has this level of awareness, the law of tort is satisfied that he intended the consequences." *23 Rutgers Law Rev* 268, 283

Since Reynolds was fully aware of Dewey's religious beliefs and notwithstanding assigned him to Sunday work and discharged him for his refusal to work on Sunday,

there can be no doubt that the intent required under the remedial section (Section 703(h)) was met.

The matter of intent was also before the United States District Court in *U.S. v. H. K. Porter Company, Inc.*, 296 F Supp 40 (N.D. Ala.) where the Court said:

> "One of the issues framed by the pre-trial order is the question of 'whether the defendant Company has had the intent which Section 707 of Title VII requires the Plaintiff to prove to establish a violation.' " 296 F Supp 40, 115.

While Sections 707 and 703 are different inasmuch as the 707 Section is an Action by the United States through the Attorney General's office, the Court in *H. K. Porter Co.* stated the following regarding *intent*:

> "At the outset, the basic thesis of the Attorney General's position on this issue is the argument that 'the best of motives will not save an employer or Union which has violated the statute.' The argument has an element of question-begging, since the question of intent enters into the determination of whether an Employer or a Union has violated the statute. *Nevertheless, the Court agrees in principle with the argument.*" (296 F Supp 40, 115) (emphasis added)

While speaking in a somewhat different context, the United States District Court in *U. S. v. Local 189 United P. & P.* 282 F Supp, 39, 45 stated:

> "But we cannot permit the Plaintiffs herein to remain without a remedy to present and continuing discrimination merely because the remedy called for involves matters which may be subject to the bargaining efforts of Unions. Title VII provides for the *correction of discriminatory practices by any remedial order which may be necessary.*" (emphasis added)

The Fifth Circuit Court of Appeals in *Local 189 v. U.S.*, 416 F 2d 980, (71 LRRM 3070), stated:

"Section 706(h) limits injunctive (as opposed to declaratory) relief to cases in which the Employer or Union has *intentionally engaged* in an unlawful employment practice. Again, the statute, read literally requires only that the Defendant meant to do what he did, that is, his employment practice was not accidental. The relevant legislative history, quoted in the margin, bears out the language of the statute on that point." (416 F 2d 980, 996; 71 LRRM 3070, 3082.)

Therefore, the relief ordered by the District Court in this case was proper and in accordance with the provisions of Title VII.

II.

Is an employee who has sought arbitration on his claim of wrongful discharge under the labor agreement barred from bringing an action in a federal district court under the Civil Rights Act of 1964 arising out of the same discharge.

A.

The doctrine of election of remedies is not applicable to a situation in which the Plaintiff enjoys two separate rights or causes of action.

The doctrines of res adjudicata and election of remedies derive from the same policy, which is, that once an issue has been litigated to a conclusion, there should be an end to the matter. However, the cases setting forth the essential circumstances necessary for invoking the doctrine of election of remedies make it clear that *the doctrine only applies when there is but one cause of action, one right infringed, and one wrong to be redressed.* The doctrine of election of remedies does not require an election between separate and distinct causes of action. See *Bankers Trust Company v. Pacific Employers Ins. Co.*, 282 F 2d 106, 110 (1960 C.A. 9th Circuit) in which case the Court said, "However, this doctrine of election of remedies applies only to

choosing between different remedies allowed by law on the same state of facts, where the party has put one cause of action, one right infringed, one wrong to be redressed."

B.

Rights created under a collective bargaining agreement and rights created under Title VII are separate and distinct rights.

The rights which Dewey sought to vindicate through the grievance — arbitration procedures are rights which were created under the collective bargaining agreement between Reynolds Metals Company of Grand Rapids, Michigan, and the International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO and Local 227. The rights which Dewey seeks to vindicate in this civil action derive from Title VII of the Civil Rights Act of 1964 as amended (42 USCA 2000 e-2). It is clear that contract rights are distinct rights and provide distinct causes of action or remedies from the rights and causes of action which derive from federal statutes. As the Court in *Bowe v. Colgate Palmolive Company,* 272 F Supp 332 (1967) said at Page 337:

> "The Court finds a fundamental difference between a claim for the violation of a collection bargaining agreement and a claim for the violation of the Civil Rights Act of 1964. The latter is a statutory embodiment of constitutional rights that all persons are entitled to enjoy, while the former has as its primary purpose the maintenance of industrial peace between labor and management. It is the belief of the Court that an employee has the right to come before the Court and assert his claim under the Civil Rights Act of 1964, without regard to any contractual remedies also available to him."

Dewey concedes that the District Court in the *Bowe's* case went on to decide against the Plaintiffs, and requiring Plaintiffs to elect. This holding was contrary to the Court's reasoning as hereinbefore quoted. However, on appeal

to the United States Court of Appeals for the Seventh Circuit *Bowe v. Colgate Palmolive Company* (USCA, 7th Cir. Sept., 1969) 416 F 2d 711, the Court of Appeals reversed the lower court. The Court, stated at 416 F 2d 711, 714:

> "The first major issue for our consideration is whether the trial court acted properly in requiring Plaintiffs to elect whether they would pursue their statutory remedy in this action or seek arbitration of grievances under the collective bargaining contract. Thus, the Court required an election of remedies prior to any decision on the merits in either of the available fora.

The Court went on to say with respect to this point, at 416 F 2d 711, 715:

> "While we recognize that there is a burden placed on the Defendant who must defend in two different fora, we also note that there may be crucial differences between the two processes and the remedy afforded by each. Also, as with unfair labor practice cases, in a case involving an alleged breach of a contract brought before an arbitrator, the arbitrator must consider himself bound to apply the contract and not to give the types of remedy which are available under the statute. Conversely, an action in Court may not be able to delve into all the ramifications of the contract nor afford some types of relief available through the contract, e.g., backpay prior to the date of the statute. *Steelworkers v. American Int'l Aluminum Corp.*, 334 F 2d 147, 56 LRRM 2682 (5th Cir. 1964), and cases cited Supra Note 1. Moreover, in an action brought under Title VII, the charging party and suing Plaintiff acts as a private attorney general who takes on the mantle of the sovereign. *Jenkins v. United Gas Corp.*, 400 F 2d 28, 32, 1 F.E.P. cases 364 (5th Cir 1968). See also *Oatis v. Crown Zellerbach Corp.*, 398 F 2d 496, 1 F.E.P. Cases 328 (5th Cir 1968)."

Another case dealing with the issue of the effect of an arbitration in a case such as the present case is *Culpepper*

v. Reynolds Metals Company, 421 F 2d 888, 61 L.C. 6995-5 (U.S.C.A. 5th Cir January 8, 1970). This case did not involve religious discrimination, but rather a claim of race discrimination. However, the Court did address itself to the issue of the effect of a prior arbitration at 421 F 2d 888, 892, wherein the Court stated:

> "In *Dewey v. Reynolds Metals Company* 291 F Supp 786, the Plaintiff, Dewey, a member of the Reformed Church brought an action under Title VII alleging that he had been discharged because of his religious beliefs. This charge was brought after Dewey had exhausted his contractual remedies including a hearing by an arbitrator and after he had exhausted his state remedies under Michigan Law. * * *. This specific question before the Court was whether Dewey's election to travel the contractual remedies route barred him from his Title VII rights. The Court, in answering * * *, stated that: 'It is understandable that any Union member would first proceed to raise any rights he felt were due him under the contract. Proceeding first, therefore, through arbitration, is in accord with Federal Labor Law. *Republic Steel Corp. v. Maddox* (51 LC §19 458) 379 US 650 (1965), *United Steel Workers v. Warrior & Gulf Nev. Co.*, 40 LC §6, 629 363 US 574 (1960) Plaintiff should not be penalized for first proceeding with his contractual remedies.'
>
> "In *King v. Georgia Power Company* 295 F Supp 943 (N.D. Ga 1968), as in other cases, it was held that contractual grievance procedures need not be exhausted prior to the filing of a complaint with the Equal Employment Opportunity Commission. The Court only said there that Title VII remedies are independent of contractual remedies and therefore there is no pre-requisite that an employee exhaust his contractual remedies before he files his charge with the E.E.O.C. The position which we take here is not inconsistent with this, for in *Georgia Power*, the Court did not deal with the question of what happens if the

employee invokes his contractual remedies. There is nothing inconsistent with stating that the employee need *only* follow the procedures for relief provided in Title VII and if he follows first his contractual remedies, he is not barred from proceeding under Title VII even if processing his contractual remedies takes more than 90 days."

The United States District Court for the Northern District of Alabama, Southern Division, in *The United States v. H. K. Porter, Inc.*, 296 F Supp 40, 109 (1968) the Court, stated as follows:

> "Objecting to the introduction of this evidence at the trial, the Attorney General argued that the award of an arbitrator cannot be res judicata or binding on the Court in a Title VII case. There has been no argument by the Defendants that any such effect should be ascribed to the award, but to put the matter to rest, the Court will say that it agrees with the Attorney General and has in no way regarded this arbitration award as in the least binding, final, or conclusive, for not withstanding Professor McCoy's eminence in the legal and arbitration professions, he was not deciding the case in the framework of the statutory provisions of Title VII. Furthermore, as a general proposition, the Court doubts that the Courts should defer in their consideration of Title VII cases, to arbitration awards." 296 F Supp 40, 109

The arbitration proceedings which Dewey pursued prior to his filing of a charge with the EEOC were limited by the contract to considering matters raised under the contract and rights arising out of the contract. Article XI Section 2 Step 5 of the Contract:

> "The arbitrator shall have authority to interpret this Agreement for the purpose of settling the grievance but he shall have no authority to add to or to detract

from or change this Agreement or to arbitrate wages for new or changed jobs or production standards."

Also see *Medo Photographic Supply Corp. v. Livingston*, 274 F Supp 209, 213 where the Court said, quoting *Torrington Co. v. Metal Products Workers Union Local 1645, UAW, AFL-CIO, ETC.*, 362 F 2d 677 (2d Cir. 1966).

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem * * * Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement."

Further, the opinion by the arbitrator (66a) indicates that the arbitrator never looked beyond the contract in determining the rights of the parties. As is evident from the cases hereinbefore cited as authority for when the doctrine of election of remedies applies and under what circumstances it applies, it is clear that when the issues or the rights litigated in two separate actions are separate and distinct, the doctrine of election of remedies is inapplicable. Further, since it is clear from a reading of the arbitrator's opinion that the only issues raised in the arbitration proceedings were the issues of the rights of the parties under the contract, obviously the issues involved in Dewey's rights under Title VII were not raised in the arbitration proceedings. Further, Dewey submits that the arbitrator would not have jurisdiction to rule upon the rights of the parties under Title VII since Congress has vested jurisdiction over disputes arising under Title VII in the United States District Courts. Congress, when it enacted Title VII, was aware of the widespread use of binding arbitration in resolving industry's labor disputes. Knowing this, Congress spelled out an entirely separate procedure to be followed in cases involving discrimination on the basis of race, sex, religion and national origin. If it intended that arbitration should be binding and there-

fore a bar to subsequent litigation in the United States District Courts, it surely would have said so.

In the field of labor law, there is a policy to promote settlement of problems by arbitration. Following the policy the Board will decline to take jurisdiction in some cases where arbitration has taken place provided certain conditions are met by the arbitration proceedings. These conditions are as follows:

(a) The factual issues before the arbitration are identical to those before the Board.

(b) The hearing and evidence presented must deal adequately with all factual issues.

(c) The arbitrator must have decided the factual issues involved before the Board. (See *Spielberg Manufacturing Co.* 112 NLRB 1980, 36 LRRM 1152 (1955) and *Raytheon Co.* 52 LRRM 1129, 140 NLRB 883 (1963) and *Auburn Rubber Co.* (1965) 156 NLRB 39, 61 LRRM 1033.

Therefore, if an issue was not raised in the arbitration hearing or if the matter was not adequately presented and the issue involves conduct which might constitute an unfair labor practice, the Board will take jurisdiction to dispose of a charge of an unfair labor practice.

As hereinbefore set forth, the issue of a violation of Title VII was not before the arbitrator. Further there was no evidence before the arbitrator that the standards determinative of whether or not a contract right of an employee has been violated are the same standards required under Title VII. The crucial language from the contract which was before the arbitration is Article IX Section 3, et seq., and specifically,

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working. . ."

The statutory language which gives rise to the case at bar is 42 U.S.C.A. 2000e-2(a), which provides:

> "(a) It shall be an unlawful employment practice for an employer,—
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or. . ."

The Fifth Circuit Court of Appeals in *Bowe v. Colgate Palmolive Company* 416 F 2d 711 (1969) the court says, at 416 F 2d 711, 714:

> "The situation facing the trial court was one in which there exists concurrent jurisdiction under the statutory scheme and under the grievance and arbitration process for the resolution of claims against an employer and a union. The analogy to labor disputes involving concurrent jurisdiction of the NLRB and the arbitration process is not merely compeling, we hold it conclusive." (footnote omitted)

Therefore, even under the labor law procedure, where arbitration may be a bar to further litigation with respect to statutory violations, the arbitration proceedings which took place prior to Dewey's filing a charge with the EE OC cannot be a bar to the vindication of his statutory rights under Title VII since these rights were never considered and never litigated in the arbitration proceedings.

CONCLUSION

It is the position of Robert Kenneth Dewey, Petitioner, that the decision of the Sixth Circuit Court of Appeals be

reversed and the District Court's Opinion and Judgment affirmed; and that the case be remanded to the United States District Court for the Western District of Michigan, Southern Division, for further proceedings pursuant to the District Court's Judgment and Opinion.

Respectfully submitted,

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SUPREME COURT

MAR 4 1974

No. 73-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT KENNETH DEWEY, Petitioner,

v.

REYNOLDS METALS COMPANY, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY, *Petitioner*

v.

REYNOLDS METALS COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE

---

1. The National Jewish Commission on Law and Public Affairs (COLPA), a voluntary association organized to combat all forms of religious prejudice

and discrimination and to represent the position of the Orthodox Jewish Community in matters of public concern, hereby applies on its own behalf and on behalf of the American Jewish Committee and the Anti-Defamation League of B'nai B'rith, for leave to submit the attached brief.

2. Pursuant to Rule 42(3) of the Revised Rules of this Court, consent to the filing of this brief was requested of the parties on January 25, 1971. Counsel for petitioner consented on January 29, 1971, to the filing of the brief, but counsel for respondent replied on February 3, 1971, that "it would not be appropriate for it [*i.e.*, respondent] to select those to whom it might grant or withhold its consent but rather this issue should be left to the discretion of the Supreme Court."

3. The National Jewish Commission on Law and Public Affairs filed *amicus* briefs in this case in the District Court, during its initial consideration by the Court of Appeals, again in support of the petition for rehearing, and again on the filing of a petition of a writ of certiorari with this Court. Its Memorandum in support of the Petition was filed with the consent of both parties.

4. The *amici* are concerned with the problem of protecting racial and religious minorities against discrimination in all aspects of life and securing for all Americans full and equal employment opportunity. Among the principal areas which have occupied the concern of COLPA and the other *amici* has been that of employment for Sabbath-Observers, who have been the victims of much discrimination in the past. The instant case is the first to come to this Court on the

subject of religious discrimination in employment, and the familiarity of the *amici* with the case law and constitutional principle on the subject will, we believe, assist the Court in its consideration of the important issues at stake.

CONCLUSION

For the foregoing reasons, the motion to file the attached brief *amici curiae* should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY, *Petitioner*

v.

REYNOLDS METALS COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The National Jewish Commission on Law and Public Affairs (COLPA) is a voluntary association of lawyers and social scientists organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community in matters of public concern.

The interest of the National Jewish Commission on Law and Public Affairs in this case—in which it filed briefs in the District Court and the Court of Appeals

—arises out of the vital importance of the legal issues presented in the within case to Sabbath-Observers throughout the country, and particularly to Orthodox Jews who are enjoined by Biblical command to "observe the Sabbath day to keep it holy" and "not [to] do any manner of work" on that day (*Deuteronomy*, V, 12, 14).

The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. It has long been a fundamental tenet of the American Jewish Committee that the welfare and security of all religious groups in the United States depend upon the preservation of Constitutional guarantees. The American Jewish Committee believes that the religious liberty of Jews will only be fully secure when the religious liberty of American citizens of all faiths is fully secure.

The Anti-Defamation League, an arm of B'nai B'rith, is a voluntary organization which has long been concerned with the preservation of the religious freedom and Constitutional rights of Jews in America. It is deeply committed to the belief that the religion clauses of the First Amendment are the surest guarantee of religious liberty and have proved the greatest guarantor of freedom of religion for all.

In the view of the *amici*, Congress' prohibition against discrimination on account of "religion" in Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), was designed to secure the rights of individual employees to the free exercise of religious practices such as Sabbath-observance wherever such practices would not impose a demonstrable undue hardship on an employer. The majority of the court below has construed the Act to deprive the religiously observ-

ant of that right, and the corresponding right to equality of employment opportunity free from discrimination, notwithstanding the definitive interpretation given the Act by the federal agency charged with its administration and implementation. In our view, the holding below presents a grave danger to religious liberty in this country and must be reversed by this Court.

QUESTIONS PRESENTED

1. Whether the prohibition in Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), against employment discrimination "because of [an employee's] * * * religion" requires an employer to make reasonable accommodation to an employee's religious observance of a weekly day of rest.

2. Whether an employer may refuse to make a reasonable accommodation to an employee's observance of a weekly day of rest because of a collective-bargaining agreement which prescribes the method for apportioning overtime work without reference to religious needs.

3. Whether the interpretive regulation construing the statutory term "religion" issued by the Equal Employment Opportunity Commission in July 1967 is a proper statutory interpretation, and whether its application to facts occurring in September 1966, amounts to *ex post facto* rulemaking.

4. Whether petitioner forfeited his Civil Rights Act remedy by unsuccessfully pursuing arbitration of his grievance under the collective-bargaining agreement.

Our brief is addressed to the first three of the above questions.

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioner's religious beliefs require him to abstain from labor on Sundays, and the issue here is simply whether federal law permits him to be discharged because he refuses to deviate from the command of his faith. There is no possible claim that the conduct in which his religion directs him to engage presents any "threat" whatever—much less a "substantial threat" —"to public safety, peace or order." *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963). Nor is there any question as to the sincerity of the belief which prompts him to act as he does.

Our argument that the conduct of petitioner's employer violated the Civil Rights Act proceeds from four premises: (1) The term "religion" as used in the Civil Rights Act of 1964 encompasses—as does the same term in the First Amendment—not merely belief but also conduct which is not socially harmful. (2) An employer engages in "discrimination" within the meaning of the Act if he rigidly applies a hiring, wage, or promotion policy which though appearing neutral on its face necessarily and ineluctibly imposes disabilities upon and effectively forecloses employment to individuals of a certain race or religion by reason thereof. (3) If an employer's superficially "neutral" policy has such an effect, he at least has the burden of demonstrating that accommodation of that policy to the needs of the religious-minority member will result in undue hardship to the operation of his business. (4) No adequate accommodation was made in this case to petitioner's legitimate religious needs.

I

Petitioner's Observance of a Weekly Day of Rest Is "Religion" Within the Meaning of the Civil Rights Act of 1964

Section 703(a)(1) of the 1964 Civil Rights Act flatly prohibits the "discharge [of] any individual * * * because of such individual's * * * religion * * *." Petitioner's employment was terminated because he refused, in accordance with his religious beliefs, to work overtime on Sundays and to obtain a replacement for his assigned overtime Sunday shifts. The initial question, therefore, is whether his discharge on this account amounted to discharge "because of" his "religion."

The majority of the Court of Appeals read "religion" narrowly and thereby misapplied the Act. It held that the "reason for [petitioner's] discharge was not discrimination on account of his religion" (App. 131a), and, on rehearing, it construed "religion" as limited to the right to hold "religious beliefs" (App. 142a). In fact, the record indisputably discloses that the sole reason for petitioner's discharge was his adherence to a principle of conduct commanded by his faith. And conduct such as observance of a weekly day of rest is protected by the constitutional and statutory safeguards for religious freedom.

That proposition was firmly established by this Court's decisions in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *In re Jenison*, 375 U.S. 14 (1963). In the *Sherbert* case, the Court held that "overt acts prompted by religious beliefs or principles" are "within the reach of state legislation" only if they pose "some substantial threat to public safety, peace or order." 374 U.S. at 403. At issue in *Sherbert* was the same conduct as

is at issue here—"conscientious objection to * * * work" on one day of the week—and this Court held that such objection "plainly enough" is protected by the constitutional safeguards for the "free exercise of religion." And the same rule was applied, at the inception of the following Term of Court, to the conscientious refusal to serve on a jury. See *In re Jenison*, 375 U.S. 14 (1963), summarily vacating 265 Minn. 96, 120 N.W. 2d 515 (1963).

As long ago as *Cantwell* v. *Connecticut*, 310 U.S. 296, 308 (1940), this Court recognized that in safeguarding the free exercise of religion the Constitution "embraces two concepts—freedom to believe and freedom to act." 310 U.S. at 303. While the Court conceded that "freedom to act" could not be absolute, it limited the permissible range of regulation of religiously-motivated conduct to that which was "for the protection of society." It also observed that the power to regulate "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom" 310 U.S. at 304.

Here, as in *Sherbert*, petitioner's conduct did not pose any threat whatever—much less a "substantial threat"—to public safety, peace or order. And, as in *Sherbert*, the conduct was directly traceable to petitioner's religious faith. Accordingly, the discharge of petitioner was well within the prohibition against discrimination on account of religion.

It is no answer to argue—as respondents have below and as the majority of the Court of Appeals did (App. 129a)—that the *Sherbert* decision was a constitutional one applicable to "state action" while the issue here is the applicability of a federal statute to private par-

ties. Both the First Amendment and Section 703 (a)(1) of the Civil Rights Act use the same term—"religion"— and the two should be construed *in pari materia*. For if Congress had intended to safeguard "beliefs" only and to leave conduct beyond the protection of the 1964 Act, it would have used the word "beliefs." By defining the right in terms of "religion"—a word which had been given meaning by this Court in its 1963 *Sherbert* decision and its 1940 *Cantwell* decision—the Congress must have intended the broad interpretation afforded by this Court's constitutional decisions.

The governing rule of statutory interpretation was applied in *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727 (1885), where the question presented for review was the meaning to be given to terms in a Colorado statute which had been enacted pursuant to the provisions of a section of the Colorado constitution. The Court said (113 U.S. at 732):

> As the clause in the Constitution and the Act of the Legislature relate to the same subject, like statutes *in pari materia*, they are to be construed together.

It is plain from its face and from its legislative history that the Civil Rights Act of 1964 was enacted to provide, *inter alia*, federal judicial remedies for private infringement of rights secured by the Fourteenth Amendment against state action and by the First and Fifth Amendments against federal interference. There can be no question, therefore, as to whether the Constitution and the Civil Rights Act "relate to the same subject," and it is appropriate that they be construed similarly.

Moreover, by incorporating in the 1964 Act a term which this Court had very recently construed in *Sherbert* and *Jenison*, the Congress must be deemed to have acted with the judicial construction in mind. See, *e.g.*, *Reina* v. *United States*, 364 U.S. 507, 510 (1960); *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948); *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924). As long ago as 1879, in *The Abbotsford*, 98 U.S. 440, 444 (1879), this rule of construction was held to apply to "words in a statute * * * [which] had acquired, through judicial interpretation, a well-understood legislative meaning," and the Court held that that meaning "is to be presumed * * * in this instance, unless the contrary is in some way made to appear."

Accordingly, the term "religion" as used in Section 703(a)(1) is not limited to beliefs but extends—as does the Free Exercise Clause of the First Amendment—to action (or, as in this case, refusal to act) based upon religious conviction. Dissenting in *Welsh* v. *United States*, 398 U.S. 333, 372 (1970), Mr. Justice White (speaking also for the Chief Justice and Mr. Justice Stewart) observed that the Religion Clause of the First Amendment "protects conduct as well as religious belief and speech," and he noted that "free exercise values [may] prompt Congress to relieve religious believers from the burdens of the law." 398 U.S. at 373. This case involves precisely that kind of decision by the Congress.

II

The Effect of Respondent's Purportedly "Neutral" Employment Policy Is To Discriminate Against Those Who Observe a Religious Day of Rest

The majority of the Court of Appeals rejected petitioner's claim of religious discrimination on the ground that "the collective bargaining agreement was equal in its application to all employees and was uniformly applied * * *" (Pet. 60a). This conclusion overlooks the necessarily discriminatory *effect* of the terms of the collective-bargaining agreement, and the decided cases squarely hold that effect—and not subjective intent—is the benchmark of statutorily prohibited discrimination.

This rule has been applied repeatedly in cases involving racial discrimination in employment, where collective-bargaining agreements which appear neutral on their face contain provisions which, in actual practice, reduce the employment opportunities of blacks. See, *e.g.*, *Local 53* v. *Vogler*, 407 F.2d 1047, 1054 (5th Cir. 1969); *United States* v. *Hayes International Corp.*, 415 F.2d 1038 (5th Cir. 1969); *Local 189, United Papermakers* v. *United States*, 416 F.2d 980 (5th Cir. 1969); *United States* v. *IBEW Local No. 38*, 428 F.2d 144 (6th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968); cf. *United States* v. *Bethlehem Steel Corp.*, 312 F. Supp. 977 (W.D.N.Y. 1970). Respondent's "uniformly applied" overtime policy had the same effect on those who, for religious reasons, observe a weekly day of rest as the similarly "neutral" provisions in the collective-bargaining agreements in the cited cases. In each instance, the consequence of the "neutrality" is to re-

duce the employment opportunities of an individual or group. Indeed, in the case of Sabbath-Observers, a policy such as respondent's has the necessary and ineluctible effect of totally *excluding* the conscientious. In the absence of remedial legislation properly construed, individuals such as petitioner, and others such as Orthodox Jews, are effectively denied employment by the application of such "neutral" rules. Simply stated, the effect of respondent's "uniformly applied neutral" policy is to deny employment to Sabbath-Observers.

It is, we submit, plainly insufficient for an employer to attempt to justify such a policy by merely saying that his policy is framed in even-handed terms. If it has the effect of excluding or harming racial or religious minorities, he must show that the requirement which is "uniformly applied" is an essential condition of maintaining and operating his business. Put in another way, the employer must show that to deviate from his policy and accommodate the religious needs of his employee would cause him undue hardship—the standard adopted by the Equal Employment Opportunity Commission. (Point (3), *infra.*) Dissenting in *Griggs* v. *Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), certiorari granted, No. 124, this Term, Circuit Judge Sobeloff said (420 F.2d at 1238):

> Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. Thus it has become well settled that "objective" or "neutral" standards that favor whites but do not serve business needs are indubitably unlawful employment practices. The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which ex-

> cludes blacks stems from legitimate needs the practice must end. * * * For example, a requirement that all applicants for employment shall have attended a particular type of school would seem racially neutral. But what if it develops that the specified schools were open only to whites, and if, moreover, they taught nothing of particular significance to the employer's needs? No one can doubt that the requirement would be invalid.

The lesson here is also to be learned from *Sherbert* v. *Verner*, 374 U.S. 398 (1963), where this Court concluded that a seemingly even-handed unemployment-compensation policy could constitutionally be applied to the detriment of Sabbath observers *only* if it were supported by a "compelling * * * interest." Mere aesthetic interest in achieving uniformity of rules was not deemed sufficient in *Sherbert* to entitle the State to override the religious needs of the Sabbath-observer. And the obligation of the private employer under Title VII of the Civil Rights Act of 1964 is, as we have shown above, no less in kind or degree than the obligation of federal, state and local governments under the First and Fourteenth Amendments.[1]

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[1] The importance of looking beyond "neutrality" of a rule was demonstrated by this Court's opinion of last Term in *Williams* v. *Illinois*, 399 U.S. 235 (1970), wherein the Chief Justice observed that a statute which appeared to apply equally to all defendants actually "visited different consequences on two categories of persons." The same is true of the seemingly "evenhanded" overtime clause of the labor contract which is involved in this case.

III

The Interpretive Regulation of Equal Employment Opportunity Commission of July 1967 Requiring Reasonable Accommodation to an Employee's Religious Requirements, in the Absence of Undue Hardship, Is a Proper Statutory Interpretation and May Be Applied to the Facts of This Case

The District Court concluded, on the stipulated facts, that petitioner's claim was governed by Section 1605.1 of the Regulations of the Equal Employment Opportunity Commission (quoted at pp. 94a-95a of the Single Appendix). That regulation, which was issued on July 10, 1967, interpreted the religion provision of the Civil Rights Act as requiring employers "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business," and it imposed on the employer the burden of proving that asserted "undue hardship" exists.

The EEOC regulation—which has been the model for similar guidelines by local agencies in at least four States and in New York City,[2] and by other agencies of the federal government[3]—is a proper—if not, indeed, necessary—construction of the Act. It is applicable to this case because it represents the considered judgment of the agency charged with enforcement of

[2] See the Appendix to our Memorandum in support of the petition for a writ of certiorari.

[3] On December 21, 1970, the Secretary of Labor issued Proposed Rule Making on the subject of "Reasonable Accommodations to the Religious Needs of Employees and Applicants" which appeared at 35 Fed. Reg. 19580-19581 (daily ed. December 24, 1970). The proposed rules—which are reprinted as an appendix to this brief—apply the same guidelines to government contractors and subcontractors.

the federal statute as to the meaning of one of its provisions. And the fact that that judgment was not published until after petitioner's discharge does not lessen its effect on this case or on petitioner's past and future rights under the Act.

The "reasonable accommodation" requirement is nothing less than a formulation, in different terms, of the legal rule applied in *Sherbert* v. *Verner, supra,* and lower-court decisions such as *Barnett* v. *Rodgers,* 410 F.2d 995 (D.C. Cir. 1969). In *Sherbert,* this Court held that the Constitution's solicitude for religion requires some flexibility in the administration of a State's unemployment-compensation system to take account of the conscientious scruples of a Sabbath-Observer. In essence, what the Court did was to direct South Carolina to make an accommodation in its otherwise superficially "neutral" policy for those whose religion required them to abstain from work on Saturdays.

In *Barnett* v. *Rodgers, supra,* the Court of Appeals for the District of Columbia Circuit considered the demand of Black Muslim prisoners in D. C. Jail for a pork-free diet. The court's holding was (410 F.2d at 1000, footnotes omitted):

> Where governmental activity impairs individual ability to abide religious beliefs, two demonstrations become essential to its validity. The first is a clear showing that "any incidental burden on the free exercise of appellant's religion [is] justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate * * *;'" on this score, "[o]nly the gravest abuses, endangering paramount interests" can engender permissible limitations on free exercise. The second is an equally

> convincing showing that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." For "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." However attractive the end to be achieved, the means employed must hoard First Amendment values.

The rule that a government agency may not, by its action, "impair individual ability to abide religious beliefs" unless it can show convincingly that a "compelling" interest requires it and that no less harmful "alternatives" are available to achieve the same goal is merely another way of requiring the agency to make a "reasonable accommodation" to an individual's religious needs and imposing on it the burden of establishing its position convincingly if it claims that such an accommodation is impossible.

Our position is, therefore, that even without the EEOC regulation, the statutory protection for "religion," construed in light of this Court's First Amendment decisions, sustains petitioner's contention. If, however, there be doubt as to the meaning of the statutory language, we believe that the authoritative interpretation of the EEOC, as reflected in the present Section 1605.1, concludes the issue. For under a long line of decisions culminating with *Udall* v. *Tallman*, 380 U.S. 1, 16 (1963), and several recent cases applying *Udall*, this Court has applied the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *Federal Communications Commission*,

395 U.S. 367, 381 (1969); see *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970).[4]

The present regulation involves the meaning of the statute; the Civil Rights Act did not give the EEOC substantive authority to make law, and the agency did not purport to exercise any such authority. Indeed, subsection (a) of the regulation plainly demonstrates, on its face, that the issue to which it is addressed is a matter of statutory construction—*i.e.*, "whether it is discrimination on account of religion to refuse to hire * * *," and subsection (d) indicates that the EEOC intends to consider future cases "on an individual basis" in light of the interpretive guideline.

In these circumstances, the majority of the Court of Appeals was plainly wrong in characterizing the application of the current interpretation to incidents occurring in 1966 as *ex post facto*. Courts and adjudicatory agencies are constantly in the business of applying their current understanding of statutory terms to past incidents; that process has never been thought to constitute unfair surprise to the parties. Nor, indeed, can respondent claim surprise here. For, as Circuit Judge Combs noted in dissent (App. 138a), the obligation on an employer to "accommodate to religious needs of employees" was part of the 1966 interpretation of the Act, even though it was not spelled out in the same specific form as the 1967 and current interpretations.[5] In this case, therefore, petitioner's

[4] This doctrine has been applied to interpretive guidelines of the EEOC as well. *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969).

[5] The District Court went further than it had to by limiting any back-pay award to the time after August 1, 1967—several weeks after the issuance of the current interpretive regulation—on the theory that "before then defendant was not on notice as to the meaning of the statute" (App. 115a).

rights were properly measured by the most recent authoritative statutory construction provided by the federal agency, and that construction was at least consistent with—if not demanded by—this Court's earlier decisions.

IV

Respondent Failed To Make a Reasonable Accommodation to Petitioner's Religious Scruples Against Personally Obtaining a Replacement for Sunday Work

We turn finally to the alternative conclusion of the majority of the Court of Appeals that respondent had made a reasonable accommodation to petitioner's religious needs by permitting him to obtain a replacement for Sunday assignments (App. 132a, 144a)—a "privilege" which, according to the majority, he "stubbornly refused to exercise" (App. 132a). The majority of the Court of Appeals erred in assuming, on the stipulated facts of this case, that the "privilege" amounted to any "accommodation" whatever. And the majority's characterization of petitioner's refusal as "stubborn" demonstrates its total misunderstanding of the nature of his religious convictions.

The stipulation of facts established that petitioner's religious beliefs affected his Sunday overtime assignments in two distinct ways: *First*, he "refused to work because of his religious beliefs" (App. 42a); and *second*, "he * * * refused because of his religious beliefs to obtain a replacement[6] in accordance with the replacement system" (*ibid.*) which respondent had put into effect in response to an earlier unrelated union

[6] The principle that it is impermissible to ask another person to do forbidden work on the Sabbath is not unique to petitioner's faith. A similar rule applies in the Jewish tradition. See 3 Maimonides, *Mishne Torah*, "Laws of the Sabbath" ch. 6.

inquiry (App. 53a-54a). It was also stipulated that "the sincerity of [petitioner's] personal religious beliefs is not contested" (App. 45a).[7]

The accommodation which respondent is said to have made to petitioner's religious needs touched only the first of these conscientious scruples; it was plainly no answer whatever to the second. By advising petitioner that he could avoid Sunday duty by violating another rule of his faith relating to Sunday observance, respondent was, in effect, telling petitioner that no accommodation was possible and that his conscientious Sunday observance would cost him his job.

A ready alternative available to the respondent was to select petitioner's replacements itself, and it apparently followed this course, without any sign of hardship, when petitioner refused to budge from his religious convictions. (See App. 63a—"When Mr. Dewey failed to report into work Sunday, Mr. Zaagman was ask [sic] to work an additional shift due to Mr. Dewey's absence.") The only suggestion from the parties as to why respondent was unwilling to make the selection of replacement employees is the cryptic assertion that such acts "would result in a waiver of the compulsory overtime provisions of the Labor Agreement" (App. 45a). Surely respondent is not given a right—which it may refuse to "waive"—by the labor agreement to violate federal law. Yet that is the only apparent explanation for its failure to take the obvious step.

[7] There is no apparent motive other than the religious one for petitioner's refusal to work on Sundays. Since the overtime provisions of the labor contract prescribe that double time is to be paid for Sunday work (App. 48a), economic motivations would seem to favor such assignments.

The record squarely belies the suggestion, made apparently *sua sponte* by the majority of the Court of Appeals, that if respondent were to select replacements it would "create chaotic personnel problems" and give rise to a "charge of unequal naming of replacements" (App. 132a). For in the grievance arbitration proceeding, the union—which would surely have been the first to raise such claims—supported the petitioner and urged "that if the Company had wanted to work out the problem it could and should have cooperated with the Union in obtaining replacements for the grievants instead of penalizing these men for their religious beliefs" (App. 74a-75a). And the arbitrator squarely rejected the argument based upon petitioner's conscientious refusal to seek a replacement not because of any alleged administrative hardship but by concluding (App. 77a): "I do not question the sincerity of their conviction that it would be sinful for them to look for a replacement, but I consider it to be misconduct under the Agreement for them to have refused to do so."[8]

The only conclusion sustainable on the record is the conclusion reached by the District Judge—"Requiring the employee to obtain a qualified replacement may be some accommodation to those who do not approve of Sunday work, but it is no accommodation whatsoever to those who believe, as petitioner does, that it is a sin to induce another to commit the sin of working on

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[8] We do not, of course, mean to suggest that the side the union takes is dispositive. In many instances, provisions in labor agreements which both employers and unions wish to preserve have the effect of discriminating against minorities. See authorities cited at p. 9, *supra*. But the union's readiness to support petitioner in this case demonstrates the insubstantiality of any claim of unfairness to other employees.

Sunday. As to this sincere religious belief of petitioner, respondent has made no accommodation" (App. 101a).

CONCLUSION

In enacting Title VII of the Civil Rights Act of 1964 Congress intended to prohibit all forms of racial and religious discrimination in private employment and to afford meaningful equal economic opportunity to all citizens. This case tests whether that promise is to be made a reality for those whose creed requires them to act or refrain from acting in a manner which does no harm to others. The record in this case demonstrates graphically that petitioner has been discharged from a job he has held for much of his adult life solely because he has refused to surrender his conscience to the demands made of him by his employer. And the employer has provided no justification for making the inflexible demands it has made. Accordingly, the judgment of the Court of Appeals should be reversed and the case remanded with instructions to affirm the judgment entered by the District Court.

Respectfully submitted,

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APPENDIX

DEPARTMENT OF LABOR

Office of the Secretary

[41 CFR Part 60]

Reasonable Accommodations to the Religious Needs of Employees and Applicants

Notice of Proposed Rule Making

Notice is hereby given that, pursuant to Executive Order 11246 (30 F.R. 12319), as amended by Executive Order 11375 (32 F.R. 14303), the Secretary of Labor is considering the addition of a new section 60-1.10, entitled "Reasonable Accommodations to the Religious Needs of Employees and Applicants," to Title 41 Part 60-1 of the Code of Federal Regulations.

The purpose of the proposed addition is to clarify the obligations of contractors and subcontractors subject to Executive Orders 11246 and 11375 with respect to the religious needs of their employees.

This proposed addition concerns matters relating to public contracts. While public participation in this rule-making is not required by 5 U.S.C. 553, the Department wishes to invite written comments, suggestions, or objections regarding this proposed addition. Accordingly, interested persons are invited to submit written comments, regarding the proposed addition to Mr. Arthur A. Fletcher, Assistant Secretary for Workplace Standards, U.S. Department of Labor, 14th Street and Constitution Avenue NW., Washington, DC 20210, within 30 days after the date of publication of this notice in the FEDERAL REGISTER.

Part 60-1 of Chapter 60 of Title 41 of the Code of Federal Regulations is hereby amended by adding § 60-1.10, reading as follows:

§ 60-1.10 Observance of Sabbath and other holidays.

(a) In order to comply with his obligations under the equal opportunity clause an employer must make reasonable accommodations to the religious needs of employees and applicants for employment who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days. The obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and applicants for employment exists when such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(b) Because the employer has the information upon which a judgment may be made, he has the burden of showing that an undue hardship renders the required accommodations to the religious needs of the employee or applicant unreasonable.

(c) Every employer shall maintain and preserve records containing the following information:

(1) Names and addresses of each employee and applicant for employment described in paragraph (a) of this section who has been discharged or denied employment and the reason or reasons in detail upon which the employer relies in justifying such discharge or refusal to hire.

(2) A listing of all job categories (job "category" herein meaning one or a group of jobs having similar content, wage rates and opportunities) for which the employer will make no accommodations to the religious needs of employees or applicants and detailed reasons in support of the employer's position in this regard.

(d) Upon request by an interested individual or organization, a prime contractor or subcontractor shall provide an assurance, in the form of a signed or endorsed notice which shall be made available for general distribution in connection with solicitation or advertisement for employees, expressly stating the extent to which the prime contractor or subcontractor will accommodate to the religious needs of employees who observe Friday evening and Saturday, or some other day of the week, as the Sabbath, or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(E.O. 11246, 30 F.R. 12319; E.O. 11375, 32 F.R. 14303)

Signed at Washington, D. C., this 21st day of December 1970.

J. D. HODGSON,
Secretary of Labor.

[F.R. Doc. 70-17371; Filed, Dec. 23, 1970; 8:50 a.m.]

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 835

ROBERT KENNETH DEWEY,

Petitioner,

v.

REYNOLDS METALS COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION OF AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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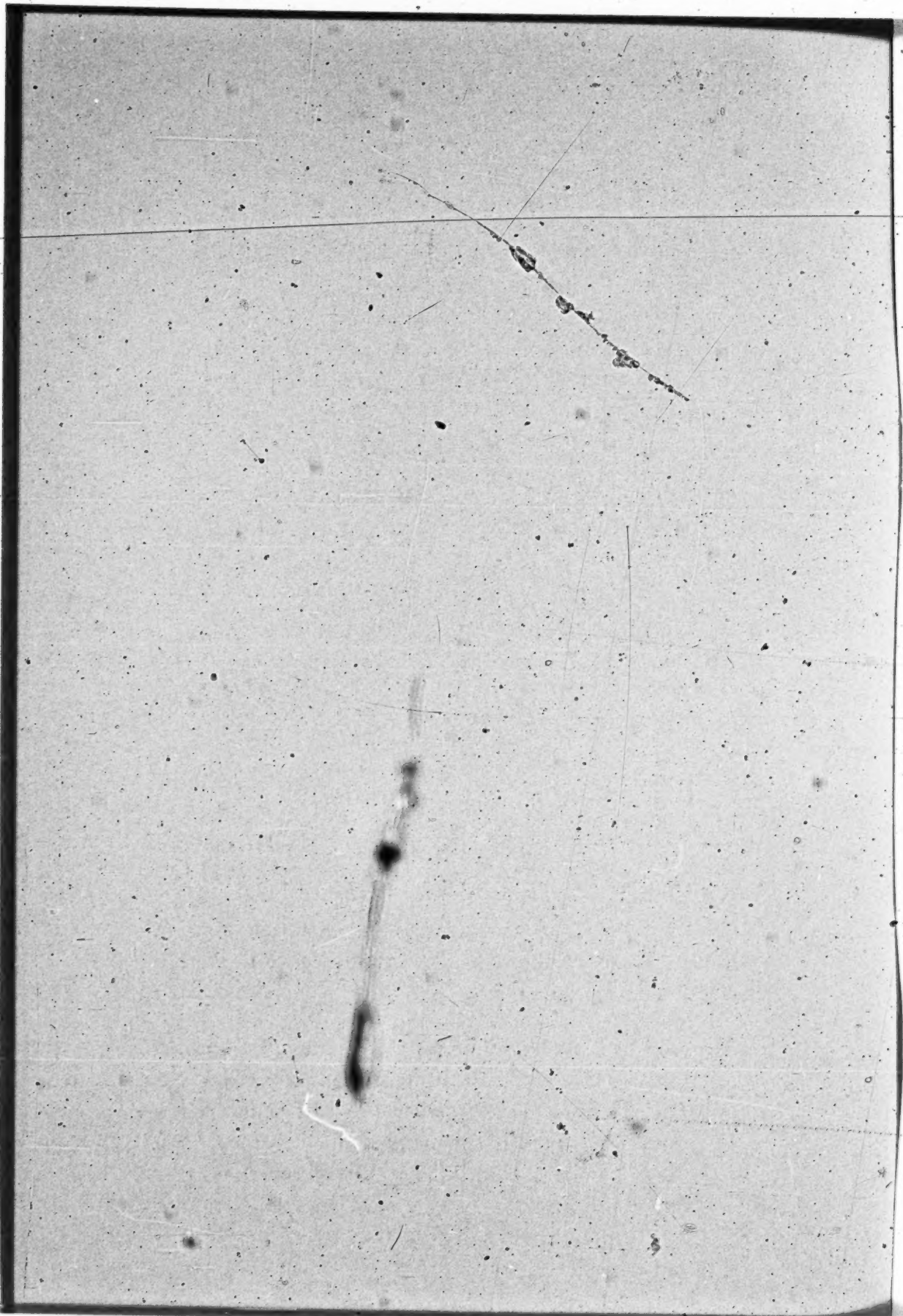

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MOTION OF AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The undersigned as attorneys for the American Jewish Congress respectfully move this Court for leave to file the attached brief *amicus curiae*.

The American Jewish Congress is a national organization of American Jews, founded more than fifty years ago to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. We are especially committed to the guaranty of religious freedom for all Americans and to the goal of equal opportunity,

without regard to race, religion or national origin, as secured by the First and Fifth Amendments and by Federal legislation.

This case raises important questions about the protection against religious discrimination afforded by Section 703(a)(1) of the Civil Rights Act of 1964. The decision below deals with the application of that statute to persons whose religious principles prohibit them from working on specified days of the week. The decision of this Court could therefore affect not only those who, like Dewey, observe Sunday as their day of rest but also the many members of the Jewish community whose religious principles prohibit them from working on Saturday or after sundown on Friday.

Accordingly, the American Jewish Congress has sought the consent of the parties to the filing of a brief *amicus curiae*. Counsel for petitioner Dewey has granted consent. Counsel for the respondent Reynolds Metals Company has withheld consent. Pursuant to Rule 42 of the Revised Rules of this Court, we therefore move for leave to file our brief *amicus curiae*, which is conditionally attached hereto.

It is the purpose of this brief to present to this Court the view that this case should be decided on the basis of the principle that the exclusionary impact of employment practices which are ostensibly applicable to all employees may sustain a charge of discrimination under the Civil Rights Act of 1964. We urge that that approach is consistent with the trend of judicial decisions interpreting other constitutional and statutory prohibitions of discrimination.

Because it is not certain that the petitioner will present this view in his brief and because we believe that our long experience and concern with all forms of religious discrimination gives us an insight on this issue that may be of value to this Court, we respectfully urge this Court to consider our brief in disposing of this case.

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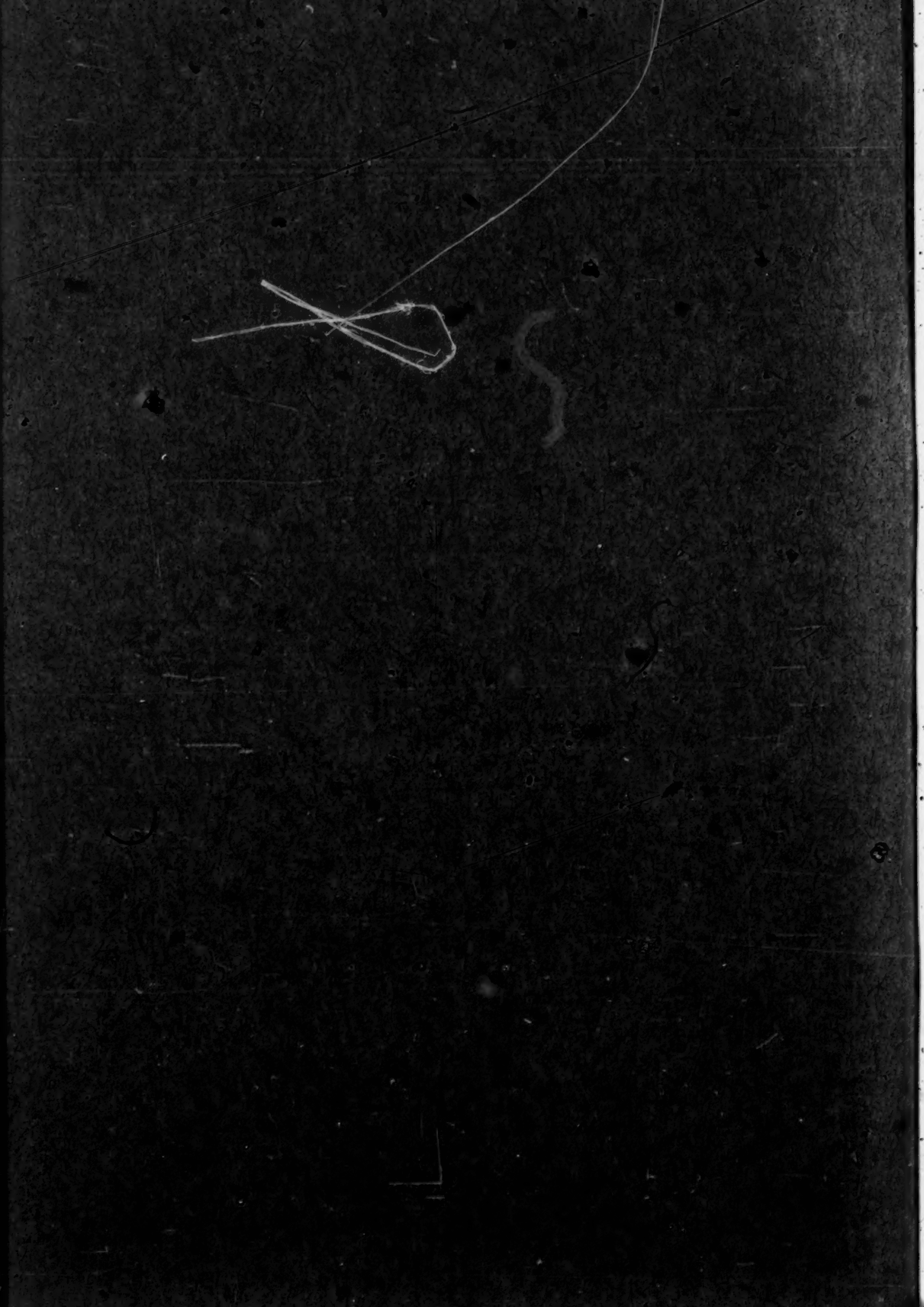

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY, PETITIONER

v.

REYNOLDS METALS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The initial opinion of the court of appeals (A. 122a–140a) is reported at 429 F.2d 324. Its opinion denying rehearing and rehearing *en banc* (A. 141a–148a) is reported at 429 F.2d 334. The opinions of the district court (A. 29a–38a, 89a–121a) are reported at 291 F. Supp. 786, 300 F. Supp. 709, and 304 F. Supp. 1116.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1970. A petition for rehearing was denied on August 11, 1970. The petition for a writ of certio-

rari was filed on October 12, 1970, and granted on January 18, 1971. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employee, alleging employment discrimination prohibited by Title VII of the Civil Rights Act of 1964, waives his right to bring an action under that Title in federal district court by first pursuing the grievance-arbitration procedures of a collective bargaining agreement.

2. Whether an employer, subject to Title VII, may lawfully discharge an employee who refuses solely for religious reasons either to work overtime on Sundays or to find a qualified replacement when the employer has made no showing that its refusal to make a reasonable accommodation to the employee's religious beliefs is necessary for the safe and efficient operation of its business.

STATUTE AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

42 U.S.C. 2000e–2

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

42 U.S.C. 2000e–5

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, * * * that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the 'respondent') with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. * * *

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under

the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceedings shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

* * * * *

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except

that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. * * *

(g) If the court finds that the respondent has intentionally engaged in or is intentionally

> engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). * * *

The pertinent EEOC *Guidelines on Discrimination Because of Religion* are set forth in Appendices A and B, *infra*, pp. 39–43.

INTEREST OF THE UNITED STATES

The decision in this case is likely to have a significant impact upon enforcement of federal rights under Title VII of the Civil Rights Act of 1964, as well as upon federal labor policy.

Title VII relies strongly on private court actions as a means of enforcing statutory rights against discrimination on the basis of religion, race, color, sex, or national origin. Cf. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400. Federal labor policy favors settlement of disputes arising under collective bargaining agreements through the grievance and arbitration procedures provided for in such agreements. The decision of the court of appeals, which requires that an employee must choose between grievance-arbitration and suit under Title VII, inevitably undermines one or both of these policies. The United States believes that the policies are complementary and that an election of rights should not be required.

Congress has also entrusted the Equal Employment Opportunity Commission and the Attorney General with important responsibilities for eliminating discriminatory employment practices. The court of appeals' refusal to recognize the responsibility of employers to abandon employment practices, not required by business necessity, which, although neutral on their face, have a religiously discriminatory effect is contrary to Commission *Guidelines* interpreting Title VII and inconsistent with this Court's recent decision in *Griggs* v. *Duke Power Co.*, No. 124, this Term. Unless reversed by this Court, the decision below could adversely affect efforts of the federal government to cure all types of discrimination forbidden by Title VII.

STATEMENT

Petitioner had been employed by the respondent company for fifteen years before he was discharged in 1966 for violations of the company's "overtime substitute" policy (A. 39a). Beginning in 1960, collective bargaining agreements between the United Automobile Workers, of which petitioner was a member, and the company have included a provision permitting the company to require employees to work overtime unless they have a substantial and justifiable reason for not doing so (A. 68a–69a).[1] In September 1965, the company issued an interpretation of the agreement which allowed an employee to be relieved of an overtime assignment by arranging for another qualified employee of the company to replace him (A. 70a).

[1] The collective bargaining agreement also provided for the processing of grievances and their arbitration.

Petitioner, a member of the Faith Reformed Church since 1961, refused, because of his religious beliefs, to work overtime on Sundays or to ask anyone to replace him on that day.[2] Upon his first refusal on August 28, 1966, petitioner was given a written warning (A. 43a). He was laid off for three days as a result of his second refusal to work or obtain a substitute on September 4, 1966, and was discharged after his third refusal on September 11, 1966 (*ibid.*) On each occasion, there were at least four of eleven employees in petitioner's job classification who were not scheduled for overtime work (A. 43a–44a).

Petitioner filed grievances because of his layoff (September 7) and discharge (September 19) (A. 43a–44a). The grievances were denied at every stage of the procedure—and finally by an arbitrator on June 29, 1967 (A. 46a, 65a–78a). At the hearing before the arbitrator, petitioner was represented by the International Representative of the Union and the chairman of its bargaining committee; respondent was represented by its attorney. Respondent filed a brief after the hearing, but no brief was filed on behalf of petitioner (A. 31a). The arbitrator ruled that:

> An important commitment arising out of one's religious convictions and obligations can

[2] Although he refused to work himself, petitioner did find a qualified replacement on five Sundays between January 1966 and August 1966. Beginning on August 28, 1966, however, petitioner refused to find a qualified replacement for Sunday work. It was stipulated that this refusal, like his refusal to work himself, was "because of his religious beliefs," the sincerity of which was not challenged (A. 42a–45a).

> provide a "substantial and justifiable reason", [within the meaning of the collective agreement] for excusing an employee from some particular work assignment, on a Sunday or some other day * * * [H]owever * * * the Agreement does not permit a regular and continuing refusal of all Sunday work on religious grounds [A. 78a].

The arbitrator did not consider the effect of Title VII, but confined his decision to the terms of the collective agreement which did not include any provision relating to discrimination on the basis of religion.

Petitioner also complained to the Michigan Civil Rights Commission, on September 16, 1966. After that commission denied his claim on December 13, 1966 (A. 46a), petitioner filed a charge with the Equal Employment Opportunity Commission on January 4, 1967. The Commission found reasonable cause to believe the company had violated Title VII and undertook conciliation. By letter dated May 3, 1968, EEOC advised petitioner that conciliation efforts had failed and notified him that he could, within thirty days, institute a civil action in the appropriate federal court. Petitioner brought this action within the thirty-day period on May 31, 1968 (A. 47a).

The district court, relying primarily upon this Court's decision in *Sherbert* v. *Verner*, 374 U.S. 398, and the Commission's *Guidelines on Discrimination Because of Religion*, issued on July 10, 1967, 29 C.F.R. 1605.1 (App. A, *infra*, pp. 39–40), held that the company's discharge of Dewey constituted religious discrimination in violation of Title VII (A. 89a–

103a). The district court rejected the contention that petitioner was precluded from suing under Title VII because he had pursued his rights under the grievance-arbitration procedure of the collective bargaining agreement (A. 29a–38a).

The court of appeals, with one judge dissenting, reversed and ordered the complaint dismissed. It ruled that suit under Title VII cannot be brought after a grievance has been finally arbitrated (A. 134a–136a). The court asserted that federal labor policy's preference for arbitration binding on both parties required that the arbitrator have the "right to finally determine" grievances based on claims of discrimination in violation of civil rights statutes. "Any other construction would bring about the result * * * that the employer, but not the employee, is bound by the arbitration" (A. 135a). This, the court reasoned, would deter employers from agreeing to include arbitration clauses in collective bargaining agreements.

The court also considered the discrimination issue. It held that there had been no violation of Title VII because the company discharged petitioner for violation of the provisions of the collective bargaining agreement, which applied equally to all employees, and not because of his religious beliefs (A. 131a).

SUMMARY OF ARGUMENT

I

The decision of the court of appeals requires an individual claiming rights under both Title VII and a collective bargaining agreement to choose one for-

um—the arbitrator or the federal courts—for a final determination of both rights. That holding, which directly conflicts with decisions of two other courts of appeals, is wrong. The rights established by Title VII and collective bargaining agreements are legally distinct, and an employee should have the opportunity to seek vindication of these rights in the separate forums which have the responsibility and competence to interpret and enforce them.

Congress intended, by Title VII, to protect individuals from discrimination by private employers on the basis of race, color, religion, sex, or national origin. It created the Equal Employment Opportunity Commission, with power to seek, by persuasion and conciliation, voluntary compliance with Title VII. But it placed the final responsibility for the enforcement of Title VII rights in the federal courts and gave aggrieved individuals the right to initiate suits.

Significant differences between the processes of arbitration of contract claims and litigation regarding statutory issues emphasize the necessity of preserving the individual's right of access to the judicial forum. An arbitrator interprets an agreement among private parties—here, the union, on behalf of the employees, and the employer. Statutory rights under Title VII are, by contrast, individual rights, whose content does not in any way depend on the existence, or the terms, of a collective agreement. The arbitrator is bound by the terms of the collective bargaining agreement, and is without power to base his awards merely on the general requirements of statutes. It is the courts, not

arbitrators, which have the responsibility, as well as the expertise, for the uniform application of Title VII guarantees. In this case, in fact, the arbitrator considered only the collective bargaining agreement, which did not contain a provision regarding religious discrimination, and he did not purport to render a decision on whether the application of that agreement violated Title VII. Under settled principles of the law of judgments, his determination should be held to have had no effect on petitioner's Title VII claims.

Permitting individuals to seek both arbitration of their contract grievances and judicial determination of their Title VII claims properly accommodates the congressional policies favoring arbitration of disputes under collective bargaining agreements and full judicial protection of the individual's Title VII rights. The approach of the court of appeals, however, inevitably would undermine one or both of these policies by forcing the individual to elect between the forums authorized to decide each of these rights. Nor is the decision of the court below justified because the employer otherwise would be subject to "litigation" regarding the same rights in more than one forum, for the rights involved are legally distinct. And Congress, in passing Title VII, quite clearly indicated that an employee was not to be deprived of adjudication of rights against discrimination, provided by various laws and agreements, in the forums responsible for interpretation and application of those rights, even though the employer might thereby be subjected to proceedings in more than one forum.

II

The court of appeals also erred in ruling that respondent had not discriminated against petitioner because of his religion in violation of Title VII. It held that the employer's "overtime substitute" policy—requiring employees themselves to obtain a replacement whenever they do not wish to work scheduled overtime, for whatever reason—is valid because it is neutral on its face, applying equally to all employees, regardless of their religion. As this Court recently held, however, Title VII does not forbid only overt discrimination. It applies as well to employment practices which are neutral on their face but discriminatory in effect. When an employment practice, neutral on its face, has a discriminatory effect, the employer must show that it is required by "business necessity." *Griggs* v. *Duke Power Co.*, No. 124, this Term, decided March 8, 1971. This concept is reflected in the Equal Employment Opportunity Commission's *Guidelines on Discrimination Because of Religion,* which require employers to make "reasonable accommodations to the religious needs" of their employees. And it is essentially the same standard which this Court has applied in protecting from governmental infringement the constitutional right to free exercise of religion. *Sherbert* v. *Verner,* 374 U.S. 398.

The religiously discriminatory effect of respondent's "overtime substitute" policy in this case is plain. It appears equally clear that the employer could easily have accommodated petitioner's religious needs simply by obtaining a substitute itself, from

among its own available, qualified employees. Respondent made no showing that "business necessity" prevented it from making a reasonable accommodation. Accordingly, the judgment of the court of appeals should be reversed.

ARGUMENT

I

PETITIONER SHOULD NOT BE DEPRIVED OF HIS RIGHT TO BRING AN ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 BECAUSE HE SOUGHT RELIEF UNDER A COLLECTIVE BARGAINING AGREEMENT AND RECEIVED AN ADVERSE ARBITRAL AWARD PRIOR TO FILING SUIT

A. Title VII and collective bargaining agreements provide legally distinct rights which are properly enforceable in different forums

1. Petitioner sought basically the same relief—reinstatement with back pay—simultaneously under the collective bargaining agreement and Title VII. He filed a grievance under the contract because of his discharge on September 19, 1966, and commenced the process which ultimately led to filing of suit under the statute on September 16, 1966, by complaining to the Michigan Civil Rights Commission.[2]

[2] Section 706(b), 42 U.S.C. 2000e–5(b), requires that a charge of unlawful employment practice must first be submitted to a state or local agency which is "author[ized] to grant or seek relief from such practice or to institute criminal proceedings." *Stebbins* v. *Nationwide Mutual Insurance Company*, 382 F. 2d 267 (C.A. 4), certiorari denied, 390 U.S. 910. Section 706(d), 42 U.S.C. 2000e–5(d), provides time limits for filing complaints with EEOC and Section 706(e), 42 U.S.C. 2000e–5(e), permits suit

The grievance-arbitration process proved speedier. Petitioner's grievances were denied finally by an arbitrator on June 29, 1967. Although he complained to the Equal Employment Opportunity Commission on January 4, 1967, the Commission did not conclude its efforts at conciliation for more than a year.[4] Petitioner promptly filed suit upon receiving notice from the Commission that conciliation efforts had failed and that he could sue in federal district court. The arbitrator's decision preceded the filing of suit under Title VII by eleven months.

The court of appeals ruled that petitioner could not obtain a judicial determination of his statutory rights under Title VII because the arbitrator's decision denying his claim under the contract was rendered first. The court stated:

> The question in our case is not whether arbitration and resort to the courts could be maintained at the same time; rather our case involves the question whether suit may be brought in court *after* the grievance has been finally adjudicated by arbitration (A. 136a).

The effect of the court's decision was, therefore, to make the arbitrator's decision binding as to petition-

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by an individual upon the Commission's failure, within a certain time, to achieve voluntary compliance with the requirements of Title VII.

[4] While the Commission's conciliation efforts are under way, the complainant may request a letter from the Commission, authorizing him to sue, any time after 60 days from the filing of the complaint with the Commission. In practice, most complainants await completion of the Commission's efforts before filing suit. See *Miller* v. *International Paper Co.*, 408 F. 2d 283 (C.A. 5).

er's claims under Title VII (on which the arbitrator did not rule) as well as under the collective bargaining agreement.[5] This holding ignores the fact that the rights established by the contract and the statute are legally distinct, even though the appropriate relief for violations of these rights may be essentially the same. Since the rights are separate, an individual asserting a violation of both of them should not be deprived of a full hearing in either of the separate forums which are authorized to interpret and enforce each of them.

Courts of appeals in two circuits, in conflict with the decision below, have correctly held that Title VII and collective bargaining agreements establish distinct rights which are separately enforceable in the appropriate forums. *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303 (C.A. 5); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (C.A. 7); see, also, *Culpepper* v. *Reynolds Metals Co.*, 421 F. 2d 888 (C.A. 5). As the court held in *Hutchings*, an "arbitrator's determination under the contract has no effect upon the court's *power* to adjudicate a violation of Title VII rights."

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[5] The court did not hold that employees must always follow the grievance-arbitration procedure rather than the Title VII procedure. Cf. *Culpepper* v. *Reynolds Metals Co.*, 421 F. 2d 888 (C.A. 5); *King* v. *Georgia Power Co.*, 295 F. Supp. 943 (N.D. Ga.). If an employee asserting rights against discrimination ignored the grievance-arbitration procedure—assuming he was not bound or could not be bound by the provisions of the collective bargaining agreement to resort first to grievance-arbitration—or if the court rendered its decision prior to the arbitrator's, the judicial decision would, under the decision below, presumably be binding as to the availability of relief under the collective bargaining agreement.

428 F. 2d at 313. An employee, then, does not waive his rights in one forum by first seeking relief in the other. Rather, he may "utilize dual or parallel prosecution both in court and through arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment or windfall to plaintiffs." *Bowe* v. *Colgate-Palmolive Co., supra,* 416 F. 2d at 715.

2. There are significant differences between the processes of arbitration under a collective agreement and litigation under Title VII which emphasize the importance of recognizing that the rights established by the contract and the statute are distinct and appropriately enforceable in separate forums.

The role of the arbitrator is fundamentally to interpret and apply the contract. As this Court has said, "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597. Accordingly, the effect of the arbitrator's award, like that of the judgment of any tribunal of special and limited jurisdiction, does not properly extend to non-contract issues. Cf. American Law Institute, *Restatement of Judgements,* § 71 and comments *a* and *d.* See, also, n. 7, *infra,* and accompanying text.

The arbitrator's expertise, moreover, is in the "industrial common law—the practices of the industry and the shop." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581–582. This expertise is one of the factors which makes arbitration the preferred forum for determination of ordinary industrial disputes primarily concerning application of the collective bargaining agreement. Arbitrators do not, however, have special competence and experience in the application of statutory and constitutional rights. See *U.S. Bulk Carriers, Inc.* v. *Arguelles*, No. 29, this Term, decided January 13, 1971; *Wilko* v. *Swan*, 346 U.S. 427. See, also, Platt, *The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 Ga. L. Rev. 398 (1969).

It is true, as the court below noted, that national labor policy strongly favors arbitration as the means of settling collective bargaining disputes. See *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650. But, as Mr. Justice Harlan, concurring, recently explained in *U.S. Bulk Carriers, Inc.* v. *Arguelles*, *supra*, the preference for arbitration applies only to "substantive rights [which] derive solely from the contract"; the fact that the employee "owes those rights to the actions of his union representative in the collective-bargaining process, warrants the extension of the boundaries of collective consent to his individual remedial preferences" (slip. op. at 4). Where a right is claimed under a federal statute, however, "the pre-

sumption of comprehensiveness of the arbitral remedy is * * * rebutted" (*id.* at 5) and remedies prescribed by statute for vindication of the statutory right remain available. See, *e.g.*, *National Labor Relations Board* v. *Strong*, 393 U.S. 357; *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432; *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 270–271; *National Labor Relations Board* v. *Huttig Sash & Door Co.*, 377 F. 2d 964, 970 (C.A. 8); cf. *Smith* v. *Evening News Assn.*, 371 U.S. 195. This principle applies *a fortiori* where, as here, the statute confers upon individuals a right that is wholly independent of the collective relationship—a right whose substance derives entirely from the statute itself (and from regulations adopted under it by the agency responsible for its enforcement).[6] Indeed, in contrast to Title VII's emphasis upon the individual's right of access to the courts, collective bargaining agreements place the responsibility for the extent and manner of processing a grievance on the Union, not

[6] Because Title VII rights are in this sense self-contained, the present case does not present the difficulty that divided the Court in *U.S. Bulk Carriers, Inc.* v. *Arguelles*, *supra*. In that case, the claimant's statutory and contract rights were interdependent—whether (and in what measure) he was entitled to the statutory penalty depended "entirely on interpretation and application of the bargaining agreement" (White, J., dissenting, slip op. at 5–6). Title VII rights, by contrast, apply equally and in the same measure irrespective of whether a collective agreement exists or whether that agreement, if it does exist, contains an anti-discrimination provision. Moreover, in further contrast to the statute involved in the *Arguelles* case, Title VII was enacted long after widespread use of arbitration under collective agreements had become established, yet, as we show, *infra*, pp. 22–25, Congress specifically provided for a different method of enforcing Title VII rights.

the individual aggrieved. See *Vaca* v. *Sipes*, 386 U.S. 171; *Republic Steel Corp.* v. *Maddox*, *supra*; Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956); see, also, *Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U.S. 324. In the present case, for example, the Union chose not to file a post-hearing brief with the arbitrator, even though the employer filed such a brief (see, *supra*, p. 8).

Arbitration, in sum, is an essentially private process "tailored to the needs of the contracting parties" *Hutchings* v. *United States Industries, Inc.*, *supra*, 428 F. 2d at 312. A very limited scope of judicial review of arbitration awards is appropriate, at least in part, because arbitrators merely interpret and apply the disparate provisions of privately-adopted agreements. A Title VII action, by contrast, assumes "a public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee." 428 F. 2d at 311. Congress has, in Title VII, created nation-wide rights and provided methods for their enforcement which assure that they will be judicially defined and uniformly applied. The decision in a Title VII suit will thus affect the entire class of persons who are the victims of discrimination and not merely the parties to a contract. The courts, accordingly, have a "special responsibility" (*ibid.*; *Bowe* v. *Colgate-Palmolive Co.*, *supra*, 416 F. 2d at 715) in the public interest to resolve Title VII claims.

3. The circumstances of this case concretely illustrate the importance of permitting the individual to

seek vindication of his Title VII rights in court, regardless of whether he also has asserted rights under the collective bargaining agreement. The contract here expressly limits the arbitrator to interpretation of the agreement (A. 35a). Under that agreement (which, as previously noted, contains no provision on the subject of religious discrimination), he found no violation of the contract in the employer's "overtime substitute" policy. There is no basis for concluding that this interpretation of the contract is wrong, much less that a reviewing court would overturn the decision. As we show below, however, the provision does conflict with Title VII. Yet the arbitrator, consistently with his limited authority, did not even consider the issues under Title VII which the employer's "overtime substitute" policy raise. Accordingly, even though the arbitration and the Title VII claim in a sense "involve[d] the same subject matter," the arbitrator's award, under settled principles, is "not conclusive * * * as to questions of law [under Title VII] not litigated" before him. American Law Institute, *Restatement of Judgments*, § 70 comment *c*.[7] Cf. *Monsanto Chemical Co.*, 130 N.L.R.B. 1097, 1099.

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[7] Indeed, even if an arbitrator were to purport to rule on Title VII issues in the course of interpreting a labor agreement, the arbitrator's determination of those issues would have no collateral estoppel effect because the arbitrator's jurisdiction is limited to deciding issues under the contract. See American Law Institute, *Restatement of Judgments* § 71 and comments *a* and *d*. This rule, which applies because of the special and limited nature of the arbitrator's jurisdiction, extends to his factual as well as his legal determinations. *Id.*, comment *d* and illustration 1.

B. The Federal Judiciary is the final forum for determining the rights conferred by Title VII.

It is true that many collective bargaining agreements themselves contain broad anti-discrimination causes. It is also true that an arbitrator may consider sources outside the contract, presumably including the requirements of enacted legislation (*United Steelworkers of America* v. *Enterprise Wheel & Car Corp., supra,* 363 U.S. at 597), as a guide to the interpretation of the contract. It is thus possible that an arbitrator can, under the contract, provide a remedy for individual discrimination in certain cases. But the possibility that the arbitrator will interpret the contract in light of Title VII or that he may have power to award satisfactory relief does not alter the ultimate responsibility which Congress has placed in the courts for the interpretation and enforcement of Title VII rights.

The broad goal of Title VII is to eliminate discrimination in employment because of race, color, religion, sex or national origin. Congress hoped that this comprehensive goal would be achieved primarily through conciliation and persuasion. To that end, it created the Equal Employment Opportunity Commission and established a procedure under Title VII whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have the opportunity to conciliate a dispute before an individual was permitted to sue. At the same time, however, Congress placed the final responsibility for enforcement of Title VII guarantees in the courts. Congress invested the Commission with authority only to

investigate an individual's charge of discrimination and to attempt to achieve voluntary compliance with the requirements of Title VII. It did not give the Commission the authority either to impose administrative sanctions or to initiate suits.[8] Rather, the statute provides that if EEOC fails to achieve conciliation, the aggrieved person himself may bring a civil action (Section 706(e), 42 U.S.C. 2000e–5(e)) in federal district court (Section 706(f), 42 U.S.C. 2000e–5(f)). And the statute authorizes the federal courts to grant injunctive relief, and to order affirmative action if they find that the Act has been violated (Section 706(g), 42 U.S.C. 2000e–5(g)). It is thus obvious from the structure of the statute that "[t]o the federal courts alone is assigned the power to enforce compliance with [Title VII], and the burden of obtaining enforcement rests upon the individual claiming to have been aggrieved by its violation." *Hutchings v. United States Industries, Inc., supra,* 428 F. 2d at 310.[9]

[8] Under Section 706(i), 42 U.S.C. 2000e–5(i), the Commission may file suit to compel compliance with an order rendered in a private suit. The Attorney General may bring suit against persons engaged in a "pattern or practice of resistance to the full enjoyment" of Title VII rights, 42 U.S.C. 2000e–6, and may intervene in private actions "of great public importance." 42 U.S.C. 2000e–5(e).

[9] This conclusion is further confirmed by the legislative history of earlier versions of the Title VII, which would have given EEOC more power. The original Senate version of Title VII, as reported out of Committee (S. 1937), provided for a quasi-judicial board with authority to receive unresolved complaints of employment discrimination from an Administrator within the Department of Labor, and to issue broad remedial orders. See *Comparative Analysis of Title VII of H.R. 7152 as Passed by the House with S. 1937, as Reported,* 110 Cong. Rec. 12596–12597, 88th Cong., 2d Sess. (June 3, 1964); 110 Cong. Rec. 12596 (Statement of Sen-

The federal courts have, consistently with the intent of Congress, emphasized the fundamental importance of individual access to the courts as the ultimate means of enforcing Title VII guarantees. They have, for example, repeatedly refused to deprive individuals of a judicial determination of their Title VII rights because of alleged procedural irregularities.[10] And the three courts of appeals which have considered the issue have held that an individual may obtain adjudication of his claim in federal district court even if EEOC has previously determined that no violation has occurred. *Fekete* v. *U.S. Steel Corp.*, 424 F. 2d 331 (C.A. 3); *Flowers* v. *Local No. 6, Laborers Int'l U. of*

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ator Clark). The House version (H.R. 7152), which the Senate considered instead of its own bill, did not provide for a board with power to issue enforcement orders. It granted the Commission authority, however, to institute civil suits in federal district court when the Commission failed to achieve voluntary compliance. The House version was eventually enacted into law, but only after the Senate had removed from EEOC an authority to initiate suits, leaving it with essentially investigation and conciliation functions. See *Comparative Analysis of the Civil Rights Bill, H.R. 7152, as Passed by the House of Representatives and by the Senate*, 110 Cong. Rec. 15999–16004, 88th Cong., 2d Sess. (July 6, 1964). This history further emphasizes the key role which Congress intended suits by individuals in the courts to have in the enforcement of Title VII.

[10] See, *e.g.*, *Sanchez* v. *Standard Brands*, 2 FEP Cases 788 (C.A. 5, No. 27,730, July 1, 1970); *Cunningham* v. *Litton Industries*, 413 F. 2d 887 (C.A. 9); *Georgia Power Co.* v. *Equal Employment Opportunity Commission*, 412 F. 2d 462 (C.A. 5); *Miller* v. *International Paper Co.*, 408 F. 2d 283 (C.A. 5); *Johnson* v. *Seaboard Air Line R.R. Co.*, 405 F. 2d 645 (C.A. 4), certiorari denied *sub nom. Pilot Freight Carriers, Inc.* v. *Walker*, 394 U.S. 918; *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (C.A. 5). But see *United States* v. *Pullman*, No. 957, this Term, certiorari granted, February 22, 1971; *Love* v. *Pullman*, No. 6008, this Term, certiorari granted, February 22, 1971.

North America, 431 F. 2d 205 (C.A. 7); *Beverly* v. *Lone Star Lead Constr. Corp.*, 3 FEP Cases 74 (C.A. 5, No. 29,620, January 19, 1971).

C. Permitting individuals alleging discrimination to proceed in more than one appropriate forum properly accommodates congressional policies favoring both private resolution of employment disputes and full protection of the individual against discrimination.

The decision below, by forcing aggrieved persons to choose between arbitration and court action as a means of resolving their claims under both collective bargaining agreements and Title VII, would inevitably undermine one or both of the federal policies favoring arbitration of contract disputes and adjudication of statutory claims. For, under this election of rights approach, individuals who believe they can obtain fuller or surer relief by invoking the remedies prescribed by Title VII would be likely to bypass arbitration; while the speed and lesser expense of arbitration might prompt others to elect arbitration and thereby relinquish their statutory right to obtain a final determination of their Title VII rights from the courts.

The policies favoring arbitration of labor disputes and adjudication of Title VII claims are, however, entirely compatible—as is shown by the approach adopted by the courts of appeals in *Hutchings, supra, Culpepper, supra, and Bowe, supra,* as well as by the implications of Title VII's legislative history.

The Seventh Circuit in *Bowe,* stressing the fact that distinct rights exist under collective bargaining agreements and Title VII, ruled simply that an individual

may pursue both rights simultaneously.[11] The Fifth Circuit, in *Hutchings* and in *Culpepper*, suggested that use of the grievance-arbitration procedure could be considered simply another means of attempting to achieve the congressional policy of private settlement of disputes. While it did not imply that resort to arbitration should be required prior to initiation of a Title VII suit, the court in *Hutchings* pointed out (428 F. 2d at 313):

> It is understandable that a union member would first proceed to vindicate any rights he felt he had under the contract. He should not be penalized for so doing * * *.
>
> Title VII outlaws certain forms of discrimination in employment. An important method for the fulfillment of congressional purpose is the utilization of private grievance-arbitration procedures. This comports not only with the national labor policy favoring arbitration as a means for the final adjustment of labor disputes * * * but also with the specific enforcement policy of Title VII that discrimination is better curtailed through voluntary compliance with the Act than through court orders. * * *

The court below asserted that it was necessary to give binding effect to the arbitrator's award because the employee would otherwise have the opportunity, not available to an employer, to "relitigate the award

[11] As in *National Labor Relations Board* v. *Acme Industrial Co.*, *supra*, 385 U.S. at 438, "the assertion of jurisdiction by * * * [EEOC and the courts under Title VII] in no way threatens the power * * * given the arbitrator to make binding interpretations of the labor agreement."

in the courts" by a Title VII suit (A. 134a).[12] This characterization is, we submit, singularly inapposite to the facts of the present case, in which, as previously noted, the collective agreement contained no anti-discrimination clause and the arbitrator of course did not purport to decide Title VII rights. But, more fundamentally, the court of appeals' approach overlooks the fact that Congress, in enacting Title VII, apparently concluded that the need to vindicate the rights of employees against discrimination was more vital than the need to protect employers against attempts to enforce these rights in more than one appropriate forum.

Title VII itself first subjects the employer to proceedings in state or local equal opportunity commissions, some of which have broader enforcement powers than EEOC, and to the conciliation efforts of the Commission, prior to judicial proceedings. And Congress clearly indicated that it did not intend, by Title VII, to preclude an individual from seeking

[12] The court also was of the view that availability of a Title VII suit after arbitration "could sound the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if * * * the awards are binding on them but not on their employees" (A. 135a). It is, however, very doubtful that permitting the individual to sue under Title VII will bring about this result. As this Court repeatedly has stressed, the arbitration agreement is essentially a *quid pro quo* for a no-strike clause in the contract. See, *e.g.*, *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770, supra; Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448. The employer thus has ample incentive to agree to an arbitration clause, regardless of the possibility that it may not prevent litigation over alleged discrimination.

rights guaranteed by other state or federal laws. The Senate rejected an amendment offered by Senator Tower which would have made the provisions of Title VII the exclusive means whereby any department, agency, or instrumentality of the federal government could grant or seek relief against employment discrimination covered by the Act. 110 Cong. Rec. 13650–13652, 88th Cong., 2d Sess. (June 12, 1964). Senator Clark, a sponsor of the bill, said in explanation that "title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." 110 Cong. Rec. 7207.

There is no reason to believe, particularly in light of the emphasis in Title VII on the ultimate authority of the courts, that the NLRB or any other governmental agency could, by the exercise of its jurisdiction, preclude resort to the courts under Title VII.[13] In fact, two courts of appeals have recently held that Title VII actions are not barred by prior adverse determinations under other laws with respect to the

[13] Under the National Labor Relations Act, it is apparently established that a union's breach of its duty of fair representation may constitute an unfair labor practice. See *Vaca* v. *Sipes*, 386 U.S. 171, 177–178, 181; *Local Union No. 12, United Rubber, C., L. & P. Workers* v. *National Labor Relations Board*, 368 F. 2d 12 (C.A. 5), certiorari denied, 389 U.S. 837. Whether racial and similar discrimination by an employer alone is an unfair labor practice is not as certain. See *United Packinghouse, Food & Allied Workers* v. *National Labor Relations Board*, 416 F. 2d 1126 (C.A.D.C.), certiorari denied, 396 U.S. 903.

same practices. See *Taylor* v. *Armco Steel Corp.*, 429 F. 2d 498 (C.A. 5) (National Labor Relations Act); *Norman* v. *Missouri Pacific Railroad*, 414 F. 2d 73 (C.A. 8) (Railway Labor Act). Much less is there reason to believe that employers and unions (against both of whom Title VII's anti-discrimination provisions are directed) can, by private agreement, deprive individuals of the right to access to the courts conferred on them by Congress.

In sum, while Congress was silent on the relationship of arbitration and Title VII rights, the multiple forum approach which it adopted with respect to other means of securing rights against discrimination strongly suggests that arbitration is merely an additional means by which individuals may seek relief from discrimination under relevant provisions of the collective agreement, without being deprived of their statutory right to a judicial determination of their Title VII rights.

II

RESPONDENT VIOLATED TITLE VII BY REFUSING TO MAKE A REASONABLE ACCOMMODATION TO PETITIONER'S SINCERE RELIGIOUS BELIEFS

A. Title VII prohibits employment practices neutral on their face which have a discriminatory effect and are not required by business necessity

The coverage of Title VII is not limited to "overt discrimination" on the basis of religion, race, color, sex, or national origin. The Act also reaches "practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, No. 124, this Term, decided March 8, 1971, slip. op. at 6. Thus, where

employment practices are neutral on their face but discriminatory in effect, the employer must show that the practices are required by "business necessity" (*ibid.*).

The question in *Griggs* was whether the employer's requirement that all prospective employees have either graduated from high school or passed a standardized general intelligence test was a racially discriminatory practice in violation of Title VII. It was shown that the employment prerequisites were not "significantly related to successful job performance" and that they "operate[d] to disqualify Negroes at a substantially higher rate than white applicants." *Id.* at 1.

The employer contended that his practices did not violate Title VII because they were neutral on their face and because there was no showing of an intent to discriminate. This Court rejected that contention and adopted, instead, the interpretation—set forth in the Commission's *Guidelines on Employee Selection Procedures,* 29 C.F.R. 1607 (35 Fed. Reg. 12333), and generally applied by the courts of appeals—that practices which have a discriminatory effect, though neutral on their face, violate Title VII unless they are shown to be necessary to the "safe and efficient operation" of the business. *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F. 2d 980, 989 (C.A. 5), certiorari denied, 397 U.S. 919. See, also, *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F. 2d 245 (C.A. 10), No. 1113, this Term, certiorari denied, March 8, 1971; *United States* v. *Sheet Metal Workers, Local 36,* 416 F. 2d 123 (C.A. 8); *United States* v. *Int'l Brotherhood of*

Electrical Workers, Local No. 38, 428 F. 2d 144 (C.A. 6), certiorari denied, 400 U.S. 943. Thus, the Court held that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Griggs,* slip op. at 8.

Griggs dealt with racial discrimination. There is, however, no basis on which to conclude that the test of "business necessity" does not apply equally with respect to other types of discrimination prohibited by Title VII. Cf. *Phillips* v. *Martin Marietta Corp.,* No. 73, this Term, decided January 25, 1971.[14] The Commission, whose interpretation of the statute "is entitled to great deference" (*Griggs* v. *Duke Power Co., supra,* at 9; *Udall* v. *Tallman,* 380 U.S. 1), has, in fact, consistently incorporated the requirement of business necessity (in an appropriately modified version) in its *Guidelines on Discrimination Because of Religion,* 29 C.F.R. 1605.1. The *Guidelines* provide "that the duty not to discriminate on religious grounds * * * includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made

[14] Section 703(e) of the Act, 42 U.S.C. 2000(e), does permit classification on the basis of "religion, sex, or national origin [but not race or color] in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The Commission has construed this exception quite narrowly. See *Phillips* v. *Martin Marietta Corp., supra,* slip. op. at. 2–3 (Marshall, J., concurring).

without undue hardship on the conduct of the employer's business." 29 C.F.R. 1605.1(b) (App. A, *infra*, p. 39).[15]

The requirement under Title VII that an employer justify practices having discriminatory effects by a showing of business necessity is similar to the require-

[15] The court of appeals stated that the district court had erred by applying these *Guidelines* (which were promulgated in 1967) to petitioner's claim of religious discrimination, rather than the *Guidelines* (App. B, *infra*, pp. 41–43) which were in effect at the time of the alleged discrimination (A. 129a–131a). The court of appeals held that the company "clearly" had complied with the prior *Guidelines* (A. 130a), although it added that the company's "overtime substitute" policy also complied with the 1967 *Guidelines*. As Judge Combs, dissenting, pointed out, however, the earlier *Guidelines* included a virtually identical general requirement of reasonable accommodation where it can be made "without serious inconvenience to the conduct of the business" (A. 138a; see App. B, *infra*, p. 41). The chief difference between the two versions of the *Guidelines* is that the earlier version attempted to provide illustrations of practices which would be acceptable despite their impact on religious practice. The court of appeals relied upon the illustrations in concluding that the respondent's "overtime substitute" policy complied with the *Guidelines*. However, the situation of petitioner was not identical to that described in any illustration. The employer did not establish a uniform workweek as a result of which all employees were required to work on Saturdays or Sundays (App. B, *infra*, pp. 41–42, 29 C.F.R. 1605.1(a)(3), (b)(3)), but, rather, permitted substitutions on these overtime days. And respondent's overtime requirements were first applied in 1965 (A. 30a), after petitioner had been employed. See App. B, *infra*, pp. 42–43, 29 C.F.R. 1605.1(b)(3), (4). Consequently, it was proper for the district court to apply the general standard, set forth by both versions of the *Guidelines*. Respondent, moreover, clearly did not rely upon the illustrations of the earlier *Guidelines* in formulating its "overtime substitute" policy. That policy was adopted in September 1965 (A. 30a), while the *Guidelines* were promulgated in 1966.

ment of a demonstration of "some compelling state interest" which this Court has utilized to protect from governmental infringement the constitutional right to free exercise of religion. See *Sherbert* v. *Verner,* 374 U.S. 398, 406; see, also, *West Virginia State Bd. of Ed.* v. *Barnette,* 319 U.S. 624; *Barnett* v. *Rodgers,* 410 F. 2d 995 (C.A. D.C.).

Sherbert involved the denial of unemployment compensation to an individual whose religion forbade her from working on Saturdays. Because of her religious practice, the Sabbatarian was discharged from employment and unable to obtain satisfactory re-employment. Her application for unemployment compensation benefits was denied because she "failed, without good cause" to accept proffered suitable employment, which involved working on Saturdays. *Sherbert* v. *Verner, supra,* 374 U.S. at 401. This Court held that "appellant's declared ineligibility for benefits derives solely from the practice of her religion * * *. The ruling [denying unemployment compensation] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404. The Court ruled that such a choice could not be required, in the absence of a compelling justification. The state's contentions of administrative necessity did not provide such a justification. 374 U.S. at 406–409. Cf. *Braunfeld* v. *Brown,* 366 U.S. 599.

Petitioner's situation, as we shall show, is quite comparable to that of the appellant in *Sherbert.* Both were required to choose between adhering to their

religion and maintaining a livelihood by policies which were not justified by compelling interests.[18]

B. Respondent's "overtime substitute" policy has a religiously discriminatory effect and was not shown to be necessary to the safe and efficient operation of its business

Petitioner was discharged because his religious needs—the sincerity of which has never been challenged (A. 45a)—prevent him either from working on Sunday or arranging for a substitute. The court of appeals insisted that "[t]he reason for Dewey's discharge was not discrimination on account of his religion * * * [but] because he violated the provisions of the collective bargaining agreement * * * [which] were applicable equally to all employees" (A. 131a). As we have shown above, however, the fact that a policy neutral on its face is applied equally to all persons does not necessarily indicate a lack of discrimination forbidden by Title VII, for the effect of such a policy may be to discriminate against individuals who hold certain religious beliefs. The "overtime substitute" policy which resulted in petitioner's discharge plainly has such a discriminatory effect.

Respondent made no "reasonable accommodation" to petitioner's religious practice. Respondent's general policy of permitting the employee who did not wish to work assigned overtime (whether for religious or other reasons) to arrange for a substitute may, incidentally,

[18] The court of appeals rejected the analogy to *Sherbert* because that case "involved state, and not private action" (A. 129a). Title VII is designed, however, to remedy private discrimination. The fact that constitutional rights were involved in *Sherbert* does not justify affording the statutory rights dealing with the same subject matter less effective protection.

be an acceptable accommodation for an employee whose sincere religious belief does not prevent him from asking another employee to work on his Sabbath in his behalf. But it does not accommodate the religious beliefs of one who cannot make such a request. In these circumstances, reasonable accommodation by the employer requires a further step, such as the simple one of arranging for the substitute himself, from among his other qualified employees.

The respondent did not show that making this simple effort to accommodate petitioner's religious needs would impose an undue hardship on the operation of its business. The court of appeals' view was that "[t]o accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey * * *. This would constitute unequal administration of the collective bargaining agreement * * * and could create chaotic personnel problems * * *" (A. 132a). Obviously, however, the employer need not *require* another employee to work in petitioner's place; like the employee seeking a substitute, the employer need only seek a voluntary replacement. The record indicates that there were several qualified replacements available on each of the Sundays petitioner was scheduled to work (A. 42a–44a), and respondent did not show that none of them would have been willing voluntarily to replace petitioner. The only necessary effect of the employer's accommodating petitioner's religious beliefs, then, would be to shift a relatively minor administrative burden from petitioner

to the employer. Moreover, even if none of the other qualified employees had been willing voluntarily to work overtime, and even if it arguably would have violated the collective agreement for the employer to require one of them to work in petitioner's place, it still would have been reasonable for the employer to impose that requirement in order to fulfill his obligations under the statute (which, of course, cannot be abrogated by the terms of the agreement).

Consequently, the respondent, by applying an "overtime substitute" policy which operated to discriminate against petitioner because of his religious needs and which was not shown to be required by business necessity, violated petitioner's rights under Title VII.

CONCLUSION

For the foregoing reasons the decision of the court of appeals should be reversed, and the case should be

remanded with instructions to reinstate the judgment of the district court.

Respectfully submitted.

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APPENDIX A

EEOC Guidelines on Discrimination Because of Religion (1967)

29 C.F.R. (1968 ed.) 1605.1 Observation of the Sabbath and other religious holidays.

(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employes who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people.

(Sec. 713(b), 78 Stat. 265; 42 U.S.C. 2000e–12 [32 F.R. 10298, July 13, 1967].)

APPENDIX B

EEOC Guidelines on Discrimination Because of Religion (1966)

29 C.F.R. (1967 ed.) 1605.1 Observance of Sabbath and religious holidays.

(a)(1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular workweek. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.

(2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate to the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.

(3) However, the Commission believes that an employer is free under Title VII to establish a normal workweek (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he re-

quires that all his employees be available for work on Saturday. Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur.

(b) While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following guidelines may prove helpful:

(1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another.

(2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.

(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alteration in such requirements to accommodate his religious needs.

(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees.

(Sec. 713(b), 78 Stat. 265; 42 U.S.C. 2000e–12) [31 F.R. 8370, June 15, 1966].)

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No. 835

IN THE

Supreme Court of the United States

October Term, 1970

ROBERT KENNETH DEWEY,
Petitioner,
vs.
REYNOLDS METALS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONSE OF RESPONDENT REYNOLDS METALS COMPANY TO MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* BY NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND AMERICAN JEWISH CONGRESS

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THE INLAND PRESS, DETROIT, MICHIGAN

IN THE

Supreme Court of the United States

October Term, 1970

No. 835

ROBERT KENNETH DEWEY,
Petitioner,
vs.
REYNOLDS METALS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Although Respondent hesitates to burden the record in this case, in all fairness it feels that this response should be made in order that the Respondent's position as stated to counsel for the *amici* might be fully and accurately before this Court.

1. On January 18, 1971 this Court granted certiorari in the above-captioned case.

2. By letter dated January 25, 1971, the National Jewish Commission on Law and Public Affairs, on behalf of itself and such other voluntary organizations as might wish to join with it, requested the consent of Respondent,

Reynolds Metals Company, to the filing of a brief on the merits *amicus curiae* in support of the Petitioner.

3. Respondent replied by letter dated February 3, 1971 that "because of the multiple issues involved, the scope of the application thereof, and the general interest therein, Reynolds Metals Company has felt that it would not be appropriate for it to select those to whom it might grant or withhold its consent but rather this issue should be left to the discretion of the Supreme Court."

4. By letter dated February 16, 1971, the American Jewish Congress requested the consent of Respondent, Reynolds Metals Company, to file a brief *amicus curiae*.

5. Respondent, Reynolds Metals Company, withheld consent by letter dated February 24, 1971. Having been advised that the Solicitor General was filing a brief *amicus curiae* in support of Petitioner and had also requested thirty (30) minutes in which to participate in the oral argument, Respondent stated that by virtue of the combined efforts of counsel for Petitioner, Respondent and the Solicitor General the issues should be adequately covered and the positions of all interested parties presented to the fullest extent.

6. The motion of the Solicitor General for leave to participate in oral argument, as *amicus curiae*, has now been granted and thirty (30) minutes has been allotted for that purpose.

7. In early March 1971, Motions For Leave To File A Brief and Briefs of National Jewish Commission on Law and Public Affairs, American Jewish Committee, Anti-Defamation League of B'Nai B'Rith, and American Jewish Congress were filed with this Court.

8. Respondent, Reynolds Metals Company, while con-

tinuing of the opinion that all pertinent facts and questions of law will be adequately presented in this matter in the course of three (3) oral arguments, neither consents nor withholds its consent to the filing of said briefs but respectfully leaves the resolution of the question to the discretion of the Court.

Dated: March 19, 1971

Respectfully submitted,
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BRIEF OF RESPONDENT REYNOLDS METALS COMPANY

OPINIONS BELOW

The opinion of the District Court denying Respondent Reynolds' motion to dismiss (29a-38a)[1] is reported at 291 F. Supp. 786. The opinion of the District Court ruling for Petitioner Dewey on the merits (89a-103a) is reported at 300 F. Supp. 709. The opinion of the District Court denying a motion to stay execution (103a-111a), is reported at 304 F. Supp. 1116. The opinions of the Court of Appeals, the majority holding for Respondent Reynolds on the merits and remanding with instructions to dismiss the complaint (122a-140a), are reported at 429 F. 2d 324. The opinions of the Court of Appeals, the majority denying

[1] Figures in parentheses are references to page numbers of Single Appendix.

the petition for rehearing and rehearing *en banc* (141a-148a), are reported at 429 F. 2d 334.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1970. A petition for rehearing was denied on August 11, 1970. The petition for writ of certiorari was filed on October 12, 1970. The jurisdiction of this Court was invoked under 28 USC Section 1254(1). Certiorari was granted January 18, 1971.

STATUTES AND REGULATIONS INVOLVED[2]

Civil Rights Act of 1964, Title VII:

Section 703(a)(1)
(42 USC Section 2000e-2(a)(1))

Section 703(h)
(42 USC Section 2000e-2(h))

Section 706(g)
(42 USC Section 2000e-5(g))

Section 713(a)
(42 USC Section 2000e-12(a))

Section 713(b)
(42 USC Section 2000e-12(b))

Equal Employment Opportunity Commission Guidelines:

Religious Discrimination Guidelines
(Effective June 15, 1966)
(29 C.F.R. 1605.1)

Religious Discrimination Guidelines
(Effective July 10, 1967)
(29 C.F.R. 1605.1)

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[2] Text is set forth in Addendum to Brief.

QUESTIONS PRESENTED

I.

Was Petitioner Dewey's discharge from employment with Respondent Reynolds Metals Company in violation of Title VII of the Civil Rights Act of 1964 (42 USC §2000e)?

II.

Was the assignment of Petitioner Dewey to Sunday overtime pursuant to the compulsory work provisions of the Labor Agreement and his discharge for refusal to accept such assignment or obtain a qualified substitute within the bona fide seniority system exception of Section 703(h) of Title VII (42 USC §2000e-2(h))?

III.

Does the Civil Rights Act of 1964 prohibition against discrimination in employment because of religion include an obligation to accommodate the religious needs of Petitioner Dewey?

IV.

Was the discharge of Petitioner Dewey in good faith reliance on the Labor Agreement?

V.

By pursuing the contractual grievance-arbitration procedure provided in the Collective Bargaining Agreement to final determination, did Petitioner Dewey make a binding election of remedies which precluded any action in a Federal District Court under the Civil Rights Act of 1964?

STATEMENT

This is an action for money damages and reinstatement of position brought under Title VII of the Civil Rights Act of 1964, 42 USC §2000e, Petitioner Dewey claiming

that he was wrongfully discharged from employment by Respondent Reynolds Metals Company because of his religious beliefs.

Respondent Reynolds is a corporation maintaining a "job type" plant in Wyoming, Michigan where it produces on an order basis[3] aluminum extrusions and aluminum billets which find principal use in such industries as architecture, building, transportation, aircraft and missile, Paragraph 2, Stipulation Of Facts (39a). Prior to 1964 the plant was accustomed to operating on a five day weekly schedule. Due to an increase in business, during 1964 and 1965 the plant operated on a schedule that was described as "five plus" days which meant that the plant was operating on many Saturdays. This schedule was further increased in late 1965 and 1966 when the plant operated on a "six plus" days weekly schedule which meant that Saturdays were worked regularly and there were numerous Sunday work schedules, Paragraph 3, Stipulation Of Facts (39a).

The production and maintenance employees at Respondent's plant (which number included Petitioner Dewey) have been and continue to be represented by the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (now known as UAW) and its Local 277 (hereinafter called the Union) with whom the Respondent had a Labor Agreement. As an

[3] This is not a mass production plant in the sense that products are manufactured to stock or before they have been ordered. Rather, a product is produced after an order therefor has been taken making it necessary for Respondent to meet delivery dates which have been set by its customers. Obviously, it is necessary for Respondent to satisfy its customers on delivery dates if it is to stay in business. Therefore, in a very real sense in times of high business activity, such as occurred in 1965 and 1966 when there was both an increase in commercial business and military requirements (26a), difficulty in scheduling overtime would result in a great hardship on Respondent.

employee of Respondent, and a Union member, Petitioner was at all times subject to said Labor Agreement, Paragraphs 4 and 5, Stipulation Of Facts (39a-40a).

Prior to the 1960 Labor Agreement between Respondent Reynolds and the Union, overtime was performed on a voluntary basis on the part of each employee. Because of employee unwillingness to work on certain overtime days such as Sunday the scheduling of overtime production was made impossible on such overtime days, Paragraph 6, Stipulation Of Facts (40a). The 1960 Labor Agreement and subsequent Labor Agreements including that negotiated with the Union in 1965 dealt with this difficulty. Respondent negotiated a section which both granted the right to Respondent to set overtime schedules and created the obligation on the part of the employees to work both straight time and overtime work required of them unless they had a substantial and justifiable reason for not doing so. The 1965 Labor Agreement also specified the manner in which the overtime assignments were to be implemented. Such assignments were to be divided as equally as possible in each job classification in each department; if less than all employees in a classification were needed, the number required were to be scheduled pursuant to the overtime equalization chart and when there were not sufficient employees obtained on such voluntary basis, then the overtime was to be assigned by Respondent among the qualified employees in the classification in the inverse order of their seniority, Paragraphs 7 and 8, Stipulation Of Facts (40a-41a).

There was also voluntarily issued by the Respondent, at the time the 1965 Labor Agreement was finalized in September 1965, an interpretation of the Labor Agree-

ment which provided that an employee would be relieved of his obligation to personally work overtime if such an employee furnished a qualified substitute. This replacement system incorporated the contractual principle that the overtime obligation remained with the employee. Such system has been used extensively since its establishment, Paragraph 9, Stipulation Of Facts (41a).

In addition to the Labor Agreement, Respondent Reynolds has also had in effect since 1957 Plant Rules which are posted on bulletin boards in each department. The Rules, including Plant Rule 11 which coyers "absence from work without reasonable cause," provide for progressive discipline running from a warning for the first offense, one week layoff for the second offense, and discharge for the third offense. Under the provision of these Plant Rules, the Respondent does have the option of imposing a lesser penalty if circumstances so warrant, Paragraph 10, Stipulation Of Facts (41a).

Petitioner Dewey was employed by Respondent Reynolds at its plant on June 14, 1951 and has held various jobs including that of die repairman, which was the job he held at his discharge September 12, 1966, Paragraph 1, Stipulation Of Facts (39a). Petitioner Dewey performed some Sunday work before his religious beliefs took form in 1961 (72a). Petitioner became a member of the Faith Reformed Church on December 4, 1961. From December 4, 1961 until his discharge, while Petitioner never volunteered for Sunday overtime work, he has been assigned Sunday work and he has volunteered for overtime work on days other than Sunday during such period, Paragraphs 11 through 15, Stipulation Of Facts (41a-42a).

Petitioner Dewey was scheduled to work overtime on

Sunday, November 21, 1965 pursuant to the Labor Agreement. Petitioner refused because of his religious beliefs; he was given a verbal warning and at the same time was advised of the necessity of Respondent scheduling work on a seven (7) day basis and was told that a repetition of such conduct would result in disciplinary action under Plant Rule 11, Paragraph 14, Stipulation Of Facts (42a).

Thereafter, between January 1966 and up to but not including August 28, 1966, Petitioner Dewey was scheduled for overtime on at least five (5) Sundays pursuant to the Labor Agreement. On each of said days Petitioner obtained replacements in accordance with the replacement system, Paragraph 15, Stipulation Of Facts (42a).

Petitioner Dewey was scheduled to work overtime on Sundays, August 28, 1966, September 4, 1966 and September 11, 1966 respectively but refused because of his religious beliefs. While Petitioner had expressed his religious beliefs against Sunday work to Respondent Reynolds on prior occasions he had utilized the replacement system. On each of these three Sundays, however, he took the further position that the obtaining of replacements was also against his religious beliefs and at this time he told one particular employee, who had served as his replacement on a number of occasions, that he would not request him to serve as his replacement again. Because of such refusal to work or to obtain replacements Petitioner Dewey was subjected to progressive discipline consisting of a written warning, a three (3) day layoff and finally discharge on September 12, 1966, Paragraphs 16, 17, 19 and 25, Stipulation Of Facts (42a-44a).

On Sunday, August 28, September 4 and September 11 there were four (4), seven (7) and six (6) employees in

the same classification as Petitioner Dewey who were qualified and not working who were available to Petitioner as possible replacements. There were also two (2) other employees, namely, Zagman and Boyer, who were outside the classification but who were qualified, each of whom was present at the end of the prior shift and available on one of the Sundays in question. However, Zagman had been told by Petitioner Dewey that he would no longer ask Zagman to replace him, Paragraphs 16, 17 and 19, Stipulation Of Facts (42a-44a).

Prior to the discharge of Petitioner Dewey, Respondent Reynolds had consistently applied the Labor Agreement and the Plant Rules to employees who refused overtime work assignments on Sunday because of religious beliefs and to employees who refused such assignments on any day for other reasons. This involved disciplinary action of varying degrees, running from warning to discharge depending on whether the violation was the first, second or third occasion, Paragraph 26, Stipulation Of Facts (45a).

Pursuant to the Labor Agreement, Petitioner Dewey filed grievances as to his three (3) day disciplinary layoff and his discharge. The grievances were processed through the grievance procedure and in the final step thereof were submitted to an arbitrator who was mutually agreed to by Respondent Reynolds and the Union. In an Opinion and Award dated June 29, 1967, the arbitrator denied the grievances and sustained the disciplinary layoff and the discharge of Petitioner Dewey, Paragraph 27, Stipulation Of Facts (46a). The arbitrator also sustained the disciplinary layoff of another employee, Hilbert Scholten, in the aforesaid Opinion and Award (78a).

On September 16, 1966, which was a few days before

Petitioner filed his grievance protesting his discharge, Petitioner filed an Application for the Issuance of a Complaint with the Michigan Civil Rights Commission alleging religious discrimination. On December 13, 1966, after investigation, that Commission issued a Notice of Disposition and Order of Dismissal stating the Commission had found insufficient grounds on which to issue a Complaint and application therefor was denied, Paragraphs 29 and 30, Stipulation Of Facts (46a). During the period subsequent to Petitioner Dewey's discharge and prior to January 1967 the United States Office of Federal Contract Compliance was invited to review the charges of discrimination alleged by Petitioner. That Office found no basis for a charge of discrimination (74a).

On January 4, 1967, Petitioner Dewey filed a charge with the Equal Employment Opportunity Commission alleging discrimination on a religious basis. On January 5, 1968, one year after the filing of the charge, the Commission, contrary to the recommendation of the Regional Director of the Equal Employment Opportunity Commission in Cleveland, Ohio that no probable cause be found, determined there was reasonable cause to believe Respondent had engaged in unlawful employment practices under Title VII, Paragraphs 31 and 32, Stipulation Of Facts (46a-47a). Conciliation efforts were made and thereafter Petitioner was notified by letter dated May 3, 1968 that he could institute a civil action in an appropriate Federal Court. Petitioner Dewey commenced the present action within thirty (30) days after the date of said letter, i.e., May 31, 1968.

Respondent Reynolds moved for dismissal for failure to state a claim upon which relief could be granted for

the reason that Respondent had made a binding election of forums. The District Court denied said Motion under date of October 18, 1968 (29a-38a).

After a trial on the merits, the District Court rendered an opinion that the overtime procedures of Respondent violated the Civil Rights Act of 1964. The District Court based its decision on Guidelines issued by the Equal Employment Opportunity Commission in July 1967, which was ten months after Petitioner had been discharged and six months after Petitioner filed his charge with the Equal Employment Opportunity Commission. The District Court also based its decision on *Sherbert* v. *Verner*, 374 U.S. 398 (1963), a case which involved state action (89a-103a). Notwithstanding Respondent Reynolds' motion for a stay of the judgment pending disposition of Respondent's appeal to the United States Court of Appeals for the Sixth Circuit, the District Court, under date of July 25, 1969, ordered the reinstatement of Petitioner Dewey with back pay and enjoined Respondent Reynolds from requiring Petitioner Dewey to perform work for Respondent on Sundays. The District Court did stay that part of the Judgment ordering the payment of back wages in the amount of seven thousand two hundred eight-six dollars and ninety-two cents ($7,286.92), upon the filing of a fifteen thousand dollar ($15,000.00) Supersedeas Bond, pending a final disposition of this cause on appeal (103a-121a).

Pursuant to the order of the District Court, Petitioner was offered reinstatement to his former position effective August 22, 1969; reported for employment on August 25, 1969, and has been so employed to date.

Under date of June 4, 1970, following the submission of briefs and oral argument, a majority of the Court of

Appeals for the Sixth Circuit reversed the District Court holding that: Petitioner Dewey's discharge was not discrimination on account of religion; the District Court more appropriately should have applied the 1966 Equal Employment Opportunity Commission Guidelines, with which Respondent Reynolds complied, rather than the 1967 Guidelines which were issued ten months subsequent to the discharge; the discharge was not on account of Petitioner Dewey's religion but rather because Petitioner Dewey violated the provisions of the Collective Bargaining Agreement, which provisions were applied equally to all employees; and in any event Respondent Reynolds had made reasonable accommodation to Petitioner Dewey's religious needs through the vehicle of Respondent Reynolds' replacement system. In addition to its decision on the merits the Court also held that suit in such a matter should not be brought in court after the same subject matter has been finally adjudicated by arbitration (122a-140a).

Thereafter, in response to a petition, a majority of the Judges of the Court of Appeals for the Sixth Circuit voted against a rehearing and a rehearing *en banc* (140a). Under date of August 11, 1970, a majority of the panel who heard the case (Judge McCree having been designated to take the place of Judge Combs who resigned prior to the filing of petition for rehearing) denied the petition for rehearing holding that the Collective Bargaining Agreement was equal in its application to all employees and was uniformly applied, discriminating against no one (141a-148a).

ARGUMENT

Introduction and Summary

Respondent Reynolds Metals Company discharged Petitioner Dewey because he violated the provisions of the

Collective Bargaining Agreement entered into by his Union with his employer, Reynolds Metals Company. The violation consisted not only of his refusing to work on three Sundays when assigned pursuant to the Collective Bargaining Agreement, but also his refusing on each of the Sundays in question to arrange for a replacement, which was an alternate procedure. Petitioner Dewey did arrange for replacements on five occasions but later refused to do this claiming it was a sin.

Respondent Reynolds argues:

I. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of religion as to employment. The compulsory work provisions of the Collective Bargaining Agreement provided a fair and equitable method of distributing the heavy workload among the employees and Respondent Reynolds uniformly applied the provisions. Said work provisions were adopted in good faith; were uniformly applied; and were negotiated in 1960 and again in 1965 and applied as a business necessity to make possible the operation of the plant in overtime situations which would include Saturday and Sunday work assignments. Title VII was not enacted to secure religious freedom by protecting the free expression of religion from actions of private parties. In any event discharge of an employee under circumstances like those in this case has been held not to violate the First Amendment where the discharge is the Act of a governmental agency.

II. Title VII of the Civil Rights Act of 1964 contains a number of exceptions to its application, one of which permits different terms of employment based upon a bona fide seniority system. The assignment of overtime to Petitioner was provided for by the Collective Bargaining Agree-

ment and specifically by the seniority system contained therein and thus falls within the exception.

III. The Civil Rights Act of 1964 prohibits discrimination in employment because of religion. There is no legal basis upon which to require an affirmative act such as accommodation to religious needs as suggested by the Equal Employment Opportunity Commission. The Commission is authorized by the Act to make interpretations but not to legislate. In requiring accommodation the Equal Employment Opportunity Commission may also be violating the Establishment Clause of the First Amendment to the United States Constitution.

IV. The Guidelines of the Equal Employment Opportunity Commission issued in 1966 interpret the Act to mean that an employer is free to establish a normal work week applicable to all employees and this would not constitute discrimination even though the schedule might not have a uniform effect on all employees. The Act states reliance on a Guideline is a bar to any action of alleged discrimination. Respondent Reynolds complied with this Guideline; the subsequent revision thereof in 1967 by the Equal Employment Opportunity Commission has no effect pursuant to the Act or application to Petitioner's discharge and accordingly the Petition should be dismissed.

The replacement system, which afforded time off for religious observance, established by Respondent Reynolds complied with the more stringent requirements for accommodation in the 1967 Guidelines.

Any further accommodation would be a serious inconvenience to the conduct of Respondent's business.

V. The remedy section of the Civil Rights Act requires an intentional violation to set in motion the remedy of re-

instatement and back pay. Reliance on the Labor Agreement takes this matter out of the intentional violation area.

VI. The rights and remedies sought in the grievance-arbitration system provided in Respondent Reynolds' Collective Bargaining Agreement (not to be discriminated against in the assignment of overtime because of religion, and reinstatement and back pay) are identical with the rights and remedies sought in the Title VII action at law. Consequently the election of remedies rule does apply and Petitioner Dewey should not be allowed to pursue the law action after pursuing the arbitration remedy to a decision. Such a bar to the law action is consistent with *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770,* 398 U.S. 235 (1970) and the Steelworkers Trilogy.

I.

PETITIONER DEWEY'S DISCHARGE FROM EMPLOYMENT WITH RESPONDENT EMPLOYER, REYNOLDS METALS COMPANY, WAS NOT IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (42 USC §2000e).

The part of the Civil Rights Act of 1964 with which we are concerned, Title VII, is entitled Equal Employment Opportunity and declares in part that it is an unlawful employment practice for an employer to discharge any individual, *or otherwise to discriminate* against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin, (Addendum to Brief, Page 60). It is clear that the prohibition of the Act runs only to discrimination and it is necessary to find a discrimination before a violation of the Act can be

found.[4] Although the Act contains lengthy provisions making it unlawful to "discriminate" because of race, color, religion, sex or national origin as regards employment, the Act does not define the term "discriminate" or the term "discrimination." Presumably, then, "discriminate" would have its commonly accepted meaning which, according to Webster's International Dictionary, is "to make a distinction or to make a difference in treatment or favor (of one as compared to others), as to discriminate in favor of one's friends; to discriminate against a special class." This is the same interpretation employed by Senators Clark (D., Pa.) and Case (R., N.J.), Floor Managers of the Bill, in a memorandum submitted to the Senate defining "discrimination:"

> "It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 [renumbered as section 703 prior to final passage] are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin." (110 Cong. Rec. 7213).

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[4] That Congress intended that the gravamen of the offense be discrimination was made plain by Senator Clark (D., Pa.), Floor Manager of the Bill in the Senate when he said:

> "The bill does not make anyone higher than anyone else. It establishes no quotas. It leaves an employer free to select whomever he wishes to employ. It enables a labor union to admit anyone it wishes to take in. It tells an employment agency that it can get a job for anyone for whom it wishes to get a job.
>
> "All this is subject to *one* qualification, and that *qualification* is to state: 'In your activity as an employer, as a labor union, as an employment agency, *you must not discriminate* because of the color of a man's skin. *You may not discriminate* on the basis of race, color, religion, national origin, or sex'," (emphasis supplied) 110 Cong. Rec. 13079-80.

Title VII was designed, as its entitlement indicates, to guarantee equal opportunity in the job market to all citizens regardless of race, color, religion, sex or national origin. The Title attempts to eliminate those factors from consideration in personnel decisions and to allow other factors such as training, ability, performance, efficiency and capability to be determinative. Respondent Reynolds submits that such equal opportunity was afforded to Petitioner Dewey in the course of his employment with Respondent Reynolds; no violation of Title VII occurred and the evidence supports this contention.

With this background, let us look at the facts. Prior to 1960, overtime in Respondent Reynolds' plant was performed by employees on a voluntary basis and Respondent Reynolds found it impossible to schedule production on certain overtime days such as Saturday and Sunday, Paragraph 6, Stipulation Of Facts (40a). To overcome this problem, Respondent Reynolds negotiated with the Union in 1960 the compulsory work provision set forth in Paragraph 7 of the Stipulation Of Facts (40a). This provision, although sought to be eliminated by the Union (69a), was again negotiated in the 1965 Labor Agreement as Section 3 of Article IX and is set forth in Trial Exhibit A (49a). The immediate succeeding provision of the Labor Agreement, Article IX, Section 4, also set forth in Trial Exhibit A (49a), provides for the allocation of overtime by dividing it equally among the employees in the classification in the department needed on a volunteer basis. If more employees are needed they are assigned in the inverse order of their seniority, Paragraph 8, Stipulation Of Facts (40a-41a). The Labor Agreement provided time and one-half for Saturday work and double time for

Sunday work with the result that such overtime work is accordingly scheduled only after careful consideration.

In addition to the compulsory overtime provision, Respondent, under date of September 20, 1965, issued an interpretation of the Labor Agreement that any employee assigned to overtime could be relieved from such assignment by his arranging for another qualified employee to replace him, Trial Exhibit B (53a-54a). The system has been used extensively since its introduction in September 1965, Paragraph 9, Stipulation Of Facts (41a).

During the years 1964, 1965 and 1966, because of increased business, the plant increased production to the point where it became necessary to work Saturdays regularly and on numerous Sundays. There were twenty-four of thirty-seven Sundays so worked between January 1, 1966 and September 11, 1966, Paragraph 3, Stipulation Of Facts (39a).

With such increased production, Petitioner Dewey was scheduled to work overtime on Sunday, November 21, 1965. Petitioner refused, was given a verbal warning, was advised of the necessity of such work being scheduled and was told that a repetition of his conduct would subject him to discipline, Paragraph 14, Stipulation Of Facts (42a). Petitioner thereafter used the replacement system when assigned overtime work on five Sundays between January and August, 1966, Paragraph 15, Stipulation Of Facts (42a). However, Petitioner Dewey, when assigned overtime work on Sundays falling on August 28, September 4 and September 11, 1966, respectively, refused to work and refused to obtain a replacement. On the basis of such refusals to follow the Labor Agreement, Petitioner Dewey was progressively warned for the August 28th violation,

disciplined with a three day layoff for the September 4th violation, and discharged for the September 11th violation, all in accordance with the Plant Rules, Paragraphs 16, 17 and 19, Stipulation Of Facts (42a-44a).

In the administration of the Labor Agreement during the period prior to Petitioner Dewey's discharge, Respondent Reynolds also took disciplinary action as to a number of other employees who refused overtime assignments on Sundays because of religious beliefs, ranging from four written warnings for first offenses to three separate three day layoffs for second offenses and four individual discharges for third violations. Respondent Reynolds also disciplined other employees for refusing to accept overtime assignments on any day for other reasons, Paragraph 26, Stipulation Of Facts (45a).

Because Respondent's plant could not otherwise meet customers' requirements during the period in question, the scheduling of overtime on Saturdays and Sundays was both reasonable and justified. Respondent operated under a Labor Agreement, binding on both Respondent and Petitioner Dewey, the terms of which authorized Respondent to make overtime assignments and Petitioner Dewey was so assigned. Petitioner violated the Labor Agreement on four occasions in refusing to accept the overtime assignment or, in the alternative, to obtain a replacement, and he was progressively disciplined resulting finally in his discharge. Respondent administered the Labor Agreement both as to Petitioner Dewey and as to other employees on a uniform and nondiscriminatory basis. Petitioner Dewey was never assigned Sunday overtime nor denied such assignments because of religion nor was he in any way treated differently from others in this

respect or because of his refusal to accept an assignment. Such actions do not portray discrimination; rather, they reveal equal employment opportunities for all employees.

This equality of treatment is perhaps best set forth by the majority opinion in the Sixth Circuit Court of Appeals in this matter when they said at pages 128a-129a:

> "We find nothing discriminatory in the provisions of the collective bargaining agreement or in the manner in which Reynolds executed it. In our opinion, it provided a fair and equitable method of distributing the heavy workload among the employees without discrimination against any of them."

This Court's decision in *Griggs* v. *Duke Power Co.*, U.S. Supreme Court (March, 1971), does not require application of a different rule. In *Griggs, supra,* this Court said:

> "Under the Act, practices, . . . neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

There is no suggestion by Petitioner, nor would one be well founded, that the compulsory overtime provisions of the Labor Agreement were applied by Respondent to perpetuate *prior* discriminatory employment practices. Petitioner does not claim Respondent engaged in such prior practices, and in the circumstances of this case, the rationale of *Griggs* does not operate to characterize as discriminatory the employment practice challenged here, which is neutral on its face, nondiscriminatory in intent and evenhanded in its application.

Moreover, even if this Court were to come to a contrary

conclusion as to the applicabilify of the doctrine of *Griggs*, Respondent has sustained the burden of showing the propriety of the compulsory overtime work rule. In setting out the so called "effect" or "impact" interpretation of Title VII in *Griggs, supra*, this Court said:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity."

Again, this Court said:

> "But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

All agree that Respondent Reynolds' application of the labor contract was equal in its application to all employees and was uniformly applied. However, Petitioner Dewey asserts that the obligation to work on Sunday or to obtain a substitute has a disproportionate impact on him because of his religious beliefs and because it limits his free exercise of religion it has the effect of being discriminatory under Title VII. Applying this effect-oriented approach to the administration of the Act, Respondent Reynolds asserts that it is also necessary to apply the other part of the interpretation and this requires a review to determine if the reason for the compulsory work assignment clause was grounded on business necessity. Prior to the 1960 Labor Agreement, overtime was performed on a voluntary basis and consequently it was impossible to schedule production on certain overtime days which included Saturdays and

Sundays. The remedy to such a restrictive production situation was to attempt to negotiate with the Union a contract provision which would permit of more production hours if such were determined necessary for business purposes. The present compulsory work assignment clause, which applies to straight time as well as overtime work, was so negotiated as part of a total labor contract with the Union in 1960 and the clause was continued in the labor contracts thereafter including that negotiated in 1965 notwithstanding that the Union sought to eliminate the clause in said negotiations (69a). Without the negotiated compulsory work clause, it was impossible to work the plant in Saturday and Sunday overtime situations prior to 1960. With the clause it was possible to so work the plant overtime in the 1960's to effectuate necessary production which permitted the plant to meet customer demands and thus remain competitive with Alcoa and Kaiser (28a). This was true in 1964 and 1965 and particularly so in 1966, the year of Petitioner Dewey's discipline and discharge, as evidenced by the fact that between January 1, 1966 and September 11, 1966, Sunday production took place on twenty-four of thirty-seven Sundays. It is submitted that the compulsory work assignment clause has a basis which satisfies the touchstone test set forth by this Court in *Griggs, supra;* the clause has a manifest relationship to the operation of the business and was a business necessity. As such the work assignment clause and its uniform application cannot constitute a violation of Title VII within the meaning of *Griggs, supra,* even if the inquiry extends beyond assurance that the clause is neutral to an investigation of its impact in practice.

There is a strong implication in Petitioner's Brief that the Civil Rights Act of 1964 was enacted to secure re-

ligious freedom by prohibiting as to any individual any invasion thereof by private parties. In other words, Petitioner Dewey suggests that the Civil Rights Act was intended as the "alter ego" of the "Free Exercise" Clause of the First Amendment. Page 12 of Petitioner's Brief so indicates when it states:

> "As a result of the enactment of this law [Civil Rights Act of 1964], such a fundamental right as freedom of religion has broader protection than previously. In passing the Civil Rights Act of 1964, Congress recognized that such a fundamental right as freedom of religion may be denied, not only by governmental action but also by the acts of private employers."

Even if this were so, it does not follow that Respondent's conduct violated the Civil Rights Act of 1964. In fact, the opposite is the case, for it has recently been held that the discharge by the Post Office Department of an employee who, contrary to union agreement, refused to perform assigned work on Saturdays because of religious scruples, does not constitute a violation of the First Amendment religious guarantees. *Dawson* v. *Mizell,* (E.D. Va. March 24, 1971).[5] The Court concluded that "there is no constitutional prohibition against the defendant insisting that plaintiff either agree to perform the duties assigned to him or suffer the consequences," and that there was "no infringement of plaintiff's rights concerning his religious beliefs."

In any event, the purpose of the Free Exercise Clause is

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[5] Because of the recent issuance of this decision it is not readily available. Accordingly, a copy thereof is herewith made available in the Addendum to Brief (Page 66).

to secure religious liberty in an individual by prohibiting any invasion thereof by civil authority. *School District of Abington Township, Pa.* v. *Schempp,* 374 U.S. 203 (1963). The issue in the present case does not involve the Free Exercise Clause; it involves the application of Title VII which among other things forbids an employer to discriminate in the terms and conditions of employment (including hiring and discharge) with the intent of providing equal employment opportunity for all persons regardless of such a factor as religion. The basic question is whether Respondent afforded Petitioner Dewey the same opportunity as everyone else in the administration of the Labor Agreement and the Plant Rules. The issue is not whether Petitioner Dewey can freely exercise his religion regardless of the Labor Agreement and regardless of how everyone else in the plant is treated.

Judge Learned Hand rejected the contention that a railroad worker had a constitutional right to reinstatement subsequent to his discharge for refusal because of religious scruples to join a union under a union contract clause when he said:

> ". . . The First Amendment protects one against action by the government, . . . but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities . . ." *Otten* v. *Baltimore & O. R. Co.,* 205 F. 2d 58, 61 (2d Cir. 1953); *Accord, Gray* v. *Gulf Mobile & Ohio Railroad Company,* 302 F. Supp. 292 (D. C. Ala. 1969), aff'd 429 F. 2d 1064, 1072 (5th Cir. 1970).

In *Griggs* v. *Duke Power Co., supra,* this Court expressed the essence of the Civil Rights Act of 1964 when it said:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities . . .
>
> "In short, the Act does not command that any person be hired . . . because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

Petitioner Dewey is not seeking equality of treatment from Respondent Reynolds Metals Company. In every sense of the word, his insistence that he not be obliged to work any Sundays when required by the Labor Agreement is a demand for preferential treatment not accorded other employees. This constitutes an insistence that his pursuit of his interests requires that others must conform their conduct to his religious necessities. Such a demand has no basis even under the First Amendment (which is not at issue here). It likewise has no basis under Title VII nor anywhere else in the Civil Rights Act of 1964.

The Michigan Civil Rights Commission, as established pursuant to the Michigan Constitution, interpreted Michigan statutory language identical to that in Title VII when it had this same case before it for decision in December 1966. It dismissed the charge holding that where the normal work week and foreseeable overtime requirements are prescribed in a Collective Bargaining Agreement, absent any intent to discriminate on religious grounds, an employee is not entitled to demand any alteration in such requirement to accommodate his religious beliefs, Trial Exhibit K (81a-82a). It is submitted that this Honorable Court should so dismiss the Petition in this matter.

II.

THE ASSIGNMENT OF PETITIONER DEWEY TO SUNDAY OVERTIME PURSUANT TO COMPULSORY WORK PROVISIONS OF THE LABOR AGREEMENT AND HIS DISCHARGE FOR REFUSAL TO ACCEPT SUCH ASSIGNMENT OR OBTAIN A QUALIFIED SUBSTITUTE WAS WITHIN THE BONA FIDE SENIORITY SYSTEM EXCEPTION OF SECTION 703(h) OF TITLE VII (42 USC §2000e-2(h)).

Title VII of the Civil Rights Act contains a number of exceptions to its application among which is Section 703(h), set out in detail at page 60, Addendum to Brief, which states that notwithstanding any other provision of Title VII an employer may apply different standards of compensation or different terms, conditions or privileges of employment pursuant to certain seniority systems. However, such variations must be pursuant to a bona fide seniority system and not the result of an intention to discriminate because of race, color, religion, sex or national origin.

What is the meaning of this exception? The problem of interpreting the statute is primarily one of discovering the intention of the legislative body which enacted it. Many times the meaning is clear on its face and courts need go no further. In the case of the Civil Rights Act the search for the legislative intent is more difficult than usual. The original House Bill (H.R. 7152) was modified substantially by the Dirksen-Mansfield-Kuchel-Humphrey Bill which was substituted for the House Bill in the Senate and was then accepted by the House. The substitute Bill was worked out in informal bipartisan conferences in the Senate and did not go through the usual committee procedures. Consequently there was no committee report in the Senate. Since the House then voted to accept the Dirksen-Humphrey Bill

without changes, there is no conference report. The best available explanations of the changes made in the House Bill are statements offered during the Senate debate by various senators, including Senator Clark (D., Pa.) and Senator Dirksen (R., Ill.). (Bureau of National Affairs Operations Manual, The Civil Rights Act of 1964, Page 289).

During the Senate debate Senator Dirksen submitted a memorandum questioning a number of provisions in the Bill. (Bureau of National Affairs Operations Manual, The Civil Rights Act of 1964, Page 332; 110 Cong. Rec. 6995-7). The text of some of the questions pertaining to Title VII and Senator Clark's response thereto is in part set out below:

> "Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> "Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race."

At the request of Senator Clark the Justice Department prepared a rebuttal to certain arguments made by Senator Hill (D., Ala.) concerning the effect of Title VII on seniority rights under a labor contract. (Bureau of National Affairs Operations Manual, The Civil Rights Act of 1964, Page 326; 110 Cong. Rec. 6986). This rebuttal stated in part:

> "First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race."

After the Senate debate which included among other things the above exchanges, Senator Dirksen introduced an amendment which is now found in the above mentioned Section 703(h) of Title VII and it states in part:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, . . ."

Concerning this Section, Senator Dirksen said in part:

> "New subsection (h) provides that an employer may apply different standards of compensation, or different terms, conditions, or privileges of employment (1) pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." (Bu-

reau of National Affairs Operations Manual, The Civil Rights Act of 1964, Page 292; 110 Cong. Rec. 12381-12385).

In the application of the principles set forth above to the instant case, the Respondent's Labor Agreement is one that has been bargained with the Union in good faith over a period of years running from a point prior to 1960; it contained a bona fide seniority system; it also contained a compulsory work assignment system first negotiated in 1960, the implementation of which was tied to the seniority system. The assignment of overtime in the present instance is governed by the Labor Agreement. Under such a state of facts, the application of the Labor Agreement to Petitioner Dewey and his fellow employees resulted in various overtime assignments including Sundays which resulted in different employees working Sundays from time to time depending on the number of volunteers and the application of the seniority clause. The Justice Department rebuttal quoted by Senator Clark, stated that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "'low man on the totem pole,'' he is not being discriminated against because of his race. It follows that when a worker is assigned overtime on a Sunday because under established seniority rules he is the "low man,'' he is not being discriminated against because of his religion. The obligation to work overtime contained in Respondent's Labor Agreement is a condition or term of employment in the language of 703(h), which condition or term is applied pursuant to a bona fide seniority system.

Further analysis of Section 703(h) shows that in order for this statutory exception to be operative the different terms or conditions or privileges of employment must not

be the "result of an intention to discriminate." In other words, to defeat a defense based upon the bona fide seniority system exception, the Petitioner must prove (a) that the employer intended to discriminate against him; and (b) that the differences in the terms, conditions or privileges of employment received are the result of such intention to discriminate. There was no showing to the District Court in the course of trial that there was any intent on the part of Respondent to discriminate against Petitioner Dewey nor that the Sunday work assignments made pursuant to the seniority clause were the result of any intent to discriminate.

The evidence in this case together with the legislative history and the inclusion of Section 703(h) in Title VII of the Civil Rights Act pertaining to the effect and application of a labor contract indicate that Petitioner Dewey was not subjected to unequal treatment or discrimination because of his religious creed within the meaning of Title VII; rather, reasonable employment criteria were applied, i.e., the compulsory overtime clause as implemented by the seniority provisions of the Labor Agreement and Petitioner Dewey by his refusals to abide by same subjected himself to justifiable discharge thereunder. Accordingly the Petition should be dismissed.

III.

THE CIVIL RIGHTS ACT OF 1964 (42 USC §2000e) PROHIBITION AGAINST DISCRIMINATION IN EMPLOYMENT BECAUSE OF RELIGION DOES NOT INCLUDE AN OBLIGATION TO ACCOMMODATE THE RELIGIOUS NEEDS OF PETITIONER DEWEY.

Virtually all statutes attacking bias in employment include a specific prohibition against religious or creed discrimination in employment. This is true for the Civil Rights

Act of 1964. It is also the case as to the ban on government contract employment discrimination promulgated by Executive Order 11246 and predecessor orders. Most state statutes in the area also provide such a ban, as for example, Michigan law, under which the Michigan Civil Rights Commission found insufficient cause and dismissed the present case in 1966 (81a-82a), which reads, in part at Section 423.303, Michigan Compiled Laws Annotated (Stat. Ann. 1968 Rev., §17.458(3)) as follows:

> "It shall be an unfair employment practice:
>
> "(a) For any employer, because of the . . . religion . . . of any individual, to refuse to hire or otherwise to discriminate against him with respect to hire, tenure, terms, conditions or privileges of employment . . ."

But having banned religious bias in employment most laws, including the Civil Rights Act of 1964 and Executive Orders (until the Department of Labor published in the Federal Register on December 24, 1970 proposed rules on the ban against religious discrimination in government contract employment), do little to spell out the meaning of the ban. The major thrust of this legislation appears to be to prevent an employer from determining during the hiring process, the religious affiliation, if any, of the applicant. But having done this, once employees are hired, without knowledge of the individual's religion, questions do arise as to the employee's right to pursue his religious beliefs. One question that inevitably arises is whether employers will discriminate on the basis of religion in a manner banned by law if they do not accommodate special requests of employees for time off for religious reasons.

The Equal Employment Opportunity Commission has answered the question twice, the first time in 1966 and

again in 1967. In June 1966 the answer was put in a Guideline as follows:

> "... The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business." (Addendum to Brief, Page 63).

The Commission also believed and stated in the same 1966 Guideline that an employer was free to establish a normal work week generally applicable to all employees, and such was not a violation of Title VII even though such a schedule, as in the present case, might not operate with uniformity in its effect upon the religious observances of all his employees. Respondent will comment and apply this Guideline in a subsequent part of this Brief.

In 1967 the Commission believed:

> "... that the duty not to discriminate on religious grounds, ... includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer." (Addendum to Brief, Page 65).

With the exception of the District Court opinion in this matter (100a-103a), the courts that have addressed themselves to the question of accommodation have ruled that the ban on discrimination does not include accommodation.

In response to the Petition for Rehearing in the present case, the majority opinion of the Sixth Circuit stated:

> "Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act." (141a)

In a latter part of the same opinion:

> "The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees." (143a)

In *Stimpel* v. *State Personnel Board of the State of California*, 85 Cal. Rptr. 797, 63 LC ¶9534 (Cal. Ct. of App., 2nd District, 1970); petition for hearing denied, 63 LC ¶9534 (Cal. S. Ct.); cert. denied 3 EPD ¶8049 (U.S. S. Ct. 1970), the California Court of Appeals was faced with the issue of whether or not the State should accommodate a Seventh Day Adventist who, because of his religious beliefs, refused to work on Saturday although employed as an inspector in a six day a week job. That Court held in part at paragraph 9534:

> "The proliferation of religions with an infinite variety of tenets would, if the state is required as an employer to accommodate each employee's particular scruples, place an intolerable burden upon the state. We conclude that if a person has religious scruples which conflict with the requirements of a particular job with the state, he should not accept employment or, having accepted, he should not be heard to com-

plain if he is discharged for failing to fullfill his duties."

In a recent case in the State of New York, *Eastern Greyhound Lines v. New York State Division of Human Rights*, 27 N.Y. 2d 279 (N.Y. Ct. of App. 1970), 3 EPD ¶8081 (1970), the Court of Appeals was asked to determine if an employer's decision not to employ an individual because he wore a beard required because of religious beliefs as an Orthodox Muslim was religious discrimination banned by New York law. At paragraph 8081 that Court held:

> "There is here no suggestion of such motivation [discrimination against creed] and, indeed, the record shows [the Company] employs a number of Muslims. The issue thus becomes very narrow: whether an employer must accommodate his general pattern of employment to the special requirements of each individual's religion.
>
> "The failure to make this kind of accommodation to particularization, which could assume many variations in appearance and in time schedules, is not in itself or in the absence of actual discrimination based on creed, a violation of . . . the Human Rights Law."

The ban on discrimination in employment is intended to provide equal employment opportunity regardless of religion. The Civil Rights statute is a mandate against differentiating between employees because of religion. On the other hand, accommodate means to adjust, adapt, help, do a favor for. In other words, to accommodate for religious purposes is to differentiate or distinguish because of religion. The concept of accommodation not only does not have any basis in the statute; in fact accommodation is a form of discrimination in and of itself. Observe the consequences of accommodation as proposed in this matter

by Petitioner and the United States. Except Petitioner Dewey from Sunday work, when his turn arises, and impose the requirement on another employee who has no religious affiliation. The consequence is that Petitioner is freed of his obligation to work because of his religion while the employee imposed on is burdened because of no religion. This specifically violates the Act in the manner proscribed by Congress because religion is the touchstone of such action. Equal opportunity does not require special opportunity or privileged opportunity. It is Respondent Reynolds' position that the Equal Employment Opportunity Commission, by virtue of Section 713(b) of the Civil Rights Act (42 USC §2000e-12(b)), has the authority to interpret the Act. The Civil Rights Act, however, did not give the Equal Employment Opportunity Commission substantive authority to make law. In this instance the Equal Employment Opportunity Commission is making law and in requiring accommodation it has exceeded its authority under the Act. "Religious discrimination should not be equated with failure to accommodate." *Dawson* v. *Mizell, supra.*

Not only does the Civil Rights Act not authorize accommodation, but the Equal Employment Opportunity Commission in adopting Guidelines which compel an employer to accommodate religious beliefs of all his employees raises the question of a violation of the Establishment Clause of the First Amendment to the United States Constitution. This Court has held in *School District of Abington Township, Pa.* v. *Schempp,* 374 U.S. 203 (1963) that the Government must be neutral with respect to religious matters. The Court at page 222 of *Schempp, supra,* declared:

". . . [W]hat are the purpose and the primary

> effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."

The Government is without power to support, assist, favor or handicap any religion. It is submitted that an administrative arm of the Government, in the form of the Equal Employment Opportunity Commission, is in fact assisting or favoring religion through its Guidelines in which it requires accommodation and such activity is forbidden by the Establishment Clause.

Respondent respectfully submits that there is no obligation to accommodate, that Respondent has in fact complied with the Act and that the Petition should be dismissed.

IV.

ASSUMING ARGUENDO THAT THE PROHIBITION OF THE CIVIL RIGHTS ACT OF 1964 (42 USC §2000e) AGAINST DISCRIMINATION IN EMPLOYMENT BECAUSE OF RELIGION INCLUDES AN OBLIGATION TO ACCOMMODATE THE RELIGIOUS NEEDS OF EMPLOYEES, RESPONDENT REYNOLDS METALS COMPANY HAS SO ACCOMMODATED PETITIONER DEWEY.

The discussion of accommodation by Petitioner Dewey at pages 13-16 of his Brief is based upon the concept that the right protected by the Civil Rights Act is a right of Free Exercise of religion. The cases cited relate to a balancing of interests when the Constitution is involved and it is respectfully submitted that they are not applicable to the present matter involving the interpretation of the Civil Rights Act. Rather, it is proposed that we observe

the approach of the Equal Employment Opportunity Commission to the Act to determine if Respondent Reynolds has an obligation to accommodate, and, if so, what is a reasonable accommodation.

The Guidelines set forth in an Addendum to this Brief (Pages 63-65) purport to be interpretations by the Equal Employment Opportunity Commission as to the scope and application of the Civil Rights Act of 1964 made pursuant to Section 713(b) of said Act (42 USC §2000e-12(b)). Said Section provides that good faith compliance with a Commission interpretation is a defense in agency and court proceedings to any alleged unlawful employment practices. There were no such Guidelines as to religious discrimination when Petitioner Dewey first violated the Labor Agreement in November 1965. The first Guidelines as to religious discrimination were effective June 15, 1966; the second such Guidelines were effective July 10, 1967.

When Petitioner Dewey violated the Labor Agreement in August and September 1966 and was disciplined and finally discharged, the June 1966 Guidelines were effective, (Addendum to Brief, Page 63). Section 1605.1(a)(2) of such Guidelines states that the Commission believes that the duty not to discriminate on religious grounds includes an obligation by the employer to accommodate the reasonable religious needs of employees where such accommodation can be made without serious inconvenience to the conduct of the business. However, the 1966 Guidelines provide in the Section immediately following a general exception to this obligation which reads:

Section 1605.1(a):

> "(3) However, the Commission believes that an employer is free under Title VII to establish a nor-

mal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

"Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur."

Respondent Reynolds established a normal work week including overtime requirements in accordance with its Labor Agreement, which schedule was generally applicable to all employees. This action was taken long prior to the discharge of Petitioner Dewey; also prior to the effective date of the Civil Rights Act; and was continued after the issuance of the June 1966 Guidelines with Respondent Reynolds believing after the issuance thereof that it was squarely in conformance therewith. Under the above quoted 1966 Guidelines, notwithstanding the fact that the schedule might not operate with uniformity in its effect upon the religious observances of all employees including Petitioner Dewey when assigned to Sunday work, it is submitted that Respondent Reynolds complied with said Guidelines, relied thereon, and consequently has a good faith defense under said Section 713(b), which defense should be a bar to this action. The subsequent revision of the Guidelines in July 1967, wherein the Commission no longer provided definite guidelines for the assistance of employers, does not eliminate the bar to the present action. Section 713(b) of Title VII specifies that such bar shall continue notwithstanding the fact that an interpretation is modified or rescinded.

The United States Brief at footnote 15 on Page 32 thereof attempts to picture to this Court that the 1966 and 1967 Guidelines were essentially the same in requiring accommodation for religious needs; the chief difference being that the 1966 version had some illustrations of practices that were acceptable despite impact on religious practice; but that in any event Respondent Reynolds did not in identical fashion fulfill any of the illustrations. Consequently, the United States argues that it was proper to apply the general standard set forth in both Guidelines.

In response, Respondent Reynolds asserts the 1966 and 1967 Guidelines are *not* essentially the same. The chief difference is *not* the existence of limited illustrations of acceptable practices. Rather, the *chief difference* is the existence in the 1966 Guidelines at 1605.1(a)(3) of a general exception to the accommodation obligation which is not found in the 1967 Guidelines. This exception is followed by another paragraph (b) in which the Commission sets forth "illustrations" of what might constitute accommodation in specific situations where accommodation is warranted. Respondent Reynolds further asserts that it *did* fulfill the general exception in that it established a normal work week applicable to all its employees prior to and continued to do so after the issuance of the 1966 Guidelines. This was equal and uniform application to all employees which complied with the principle enunciated in the Guidelines. Consequently it is not proper to apply the general standard set forth in both Guidelines. To state as does the United States Brief that Respondent Reynolds did not identically follow the illustration by having all employees work on Saturday or Sunday is to completely misunderstand the purpose of an illustration. The principle

of the exception was articulated in the Guidelines. It was based on equal or uniform application to all employees. An illustration is merely an example intended not to exhaust the meaning of a principle, but to assist in its interpretation or understanding; it is not set forth for the purpose of slavish adherence. To restrict the Respondent or anyone else to the specific illustration is an attempt to exhalt the illustration of the exception over the exception itself.

The 1966 Guidelines at Section 1605.1(b)(3) also authorized the employer to prescribe "the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs." Petitioner Dewey did not acquire his religious beliefs until after Respondent Reynolds had entered into the 1960 Collective Bargaining Agreement negotiated by the Union which required all employees to work overtime when so assigned (41a). Petitioner Dewey thus had actual knowledge that the requirements of the Collective Bargaining Agreement would conflict with his subsequently acquired religious needs. Under the 1966 Guidelines, Petitioner had no right to demand accommodation. There was no claim that Respondent intended to discriminate on religious grounds. The Guidelines had the force and effect of law and again constitute a good faith defense to this action under Section 713(b) notwithstanding the subsequent revision of the Guidelines.

Should one ignore the exceptions in the Guidelines and

apply the general requirement of accommodating the reasonable religious needs of employees (1966) or of making reasonable accommodations to the religious needs of employees (1967) (Addendum to Brief, Pages 63-65), it is submitted that Respondent has complied with the Guidelines. For example, in allocating overtime, Respondent Reynolds has fulfilled the accommodation requirement by first requesting volunteers to perform the overtime. Thereafter, when an employee is assigned overtime under the Labor Agreement, there is a further accommodation in that he can free himself of the obligation by obtaining a qualified replacement. This replacement system has been used extensively since 1965, Paragraph 9, Stipulation Of Facts (41a). Petitioner Dewey used the replacement system on at least five (5) Sundays in 1966 after which time he altered his religious belief and refused to obtain a replacement as in the past. It is submitted that Respondent Reynolds has made an accommodation that fully complies with the Guidelines whether expressed in terms of accommodating reasonable religious needs (1966) or reasonably accommodating religious needs (1967) in that it permitted Petitioner Dewey, by the use of the replacement system, to observe Sunday as his Sabbath and as a consequence not work on such days, which is the religious need to which the Guidelines are totally and specifically directed.

However, the District Court found that requiring an employee to obtain his own replacement might be some accommodation to those who do not approve of Sunday work, but it is no accommodation whatsoever to those who believe, as Petitioner Dewey does, that it is a sin to induce another to commit the sin of working on Sunday. As to this sincere religious belief of Petitioner Dewey, says the District Court, the Respondent has made no accommoda-

tion (101a), A reading of the Guidelines discloses that the Equal Employment Opportunity Commission believes the duty not to discriminate on religious grounds includes an obligation by the employer to make reasonable accommodations to the religious needs of employees where such can be done without undue hardship on the conduct of employer's business. What are the religious needs to which reference is made in the Guidelines? The needs are those of an employee whose religious observances require that he take time off during the employer's regular work week (1966) or who regularly observes a day of the week as his Sabbath and as a consequence does not work on such days. Respondent's substitute system accommodates this need for time off by relieving an employee of his work assignment on his Sabbath thus fulfilling the obligation as viewed by the Guidelines. When the District Court goes further and says that Respondent's substitute system is not an accommodation for Petitioner Dewey who believes it a sin to ask another to work (101a), this argument is based on the free exercise of religion argument not on the issue of discrimination and it also goes beyond anything set forth in the Guidelines. There is no such free exercise right carried over from the Constitution to the Civil Rights Act either by the Preamble or by the language of the Act; the Guideline language specifically talks in terms of religious needs, i.e., not working on a certain day of the week, and it does not talk in terms of beliefs.

However, assuming for the sake of argument that this Court should decide that the religious need to be accommodated is not necessarily confined to observance of a Sabbath, but that it is broader in scope, this raises a further question. What is the reasonable accommodation re-

quired of an employer pursuant to the Guidelines? The District Court held that there was no accommodation to Petitioner's belief that it was a sin to request others to work for him on Sunday. The Court of Appeals for the Sixth Circuit found Respondent made a reasonable accommodation to the religious needs of its employees when it permitted Petitioner, by the replacement system, to observe Sunday as his Sabbath (132a). The Guidelines are phrased in terms that require a reasonable accommodation to religious needs. It is necessary to consider the need under consideration and then relate it to the Guideline requirements. The beliefs which Petitioner Dewey professes to hold in relation to asking others to work for him on Sunday are private and subjective and there is no evidence in the record to support the view that they are required by the announced principles of any formal religion. It is suggested that it is unreasonable to expect accommodations to meet the private and subjective religious notions as set forth by each individual. Where an accommodation has been made which is adequate to meet the announced principles of any formal religion on the issue in question (observance of Sundays in this case), it is suggested that such an accommodation is reasonable within the meaning of the Guidelines and consequently the requirements of the Guidelines have been fulfilled.

The District Court held that requiring the Petitioner to obtain his replacement, either was no accommodation or was not a reasonable accommodation. What further accommodation could be made? The obvious answer would be for the Respondent to obtain the substitute on the occasions when Petitioner Dewey was scheduled to work. The issue then is whether in the words of the Guidelines such an accommo-

dation could be made without serious inconvenience (1966) to or without undue hardship (1967) on the Respondent's business. Respondent Reynolds contends the answer must be in the negative for the reasons set forth below.

The compulsory work clause was negotiated into the Labor Agreement with the Union in 1960 to overcome the inability to schedule overtime and was included in the 1965 Agreement. The substitute system was initiated by Respondent Reynolds in 1965 and was used extensively. The substitute system is an extension of the negotiated compulsory work clause because the obligation continues to rest on the employee. The proof establishes that Respondent does not accord special privileges with respect to work assignments to individual employees whether the reason proposed for the privilege was religious or secular, Paragraph 26, Stipulation Of Facts (45a). If Respondent Reynolds were to obtain substitutes for Petitioner Dewey on every occasion he was assigned Sunday overtime, Respondent Reynolds would be excepting Petitioner Dewey from the compulsory work assignment clause. Under such circumstances Respondent Reynolds would be obliged on the basis of equal and impartial administration of the Labor Agreement to so except other employees in the many other classifications in the plant who did not want to perform overtime on Sundays and other overtime situations whether the reason be religious or secular. This would contractually negate the compulsory work assignment clause and without such a clause Respondent Reynolds would very well find itself in a position comparable to or worse than that of pre-1960, where Respondent Reynolds found it impossible to schedule overtime on certain overtime days.

Petitioner argues at page 19 of his Brief that the Civil

Rights Act requires accommodation as to Petitioner, but that the Act does not prevent compelling other employees who have other nonreligious reasons for not working. The Brief of the United States at page 36 thereof makes the same argument even if it means violating the Labor Agreement. If all Sunday work is assigned to such employees, there can be a valid objection by these same employees because they are being compelled because of a lack of religion while employees who espouse religious reasons are being excused. The law was intended to prohibit discrimination on any religious basis, i.e., either pro or anti religion. Evidence of this intent is found in the colloquy between Congressman Ashbrook (R., Ohio) and Congressman Celler (D., N.Y.) on the occasion of Ashbrook's offering an amendment to Title VII permitting employers to refuse to hire atheists. Ashbrook posed the following hypothetical:

> "A man comes for employment and the employer is honest enough to tell the applicant, while he is otherwise qualified, he will not hire anyone of atheistic convictions . . . It is my interpretation of the bill that . . . he could allege he has been discriminated against and proceed against the employer.
>
> "I wonder if the chairman of the Committee on the Judiciary could give me his interpretation of this."

Celler replied:

> "The bill provides there can be no discrimination on the ground of religion. That is the answer I have to give you."

After some sparring Ashbrook said:

> "This [refusal to hire an atheist] would be a practice which the employer could not do, according to what you said. He could not discriminate against a person because he is an atheist. Is that correct?"

Celler replied:

"That is correct." (110 Cong. Rec. 2607)

It is submitted that both Petitioner Dewey and the United States, rather than finding a defect in Respondent Reynolds' position, have proposed a "solution" which constitutes a violation of the Act.

In addition to a possible Title VII violation for requiring nonreligious to work on such overtime days even though by seniority and overtime equalization it was not their turn, such action would have placed Respondent Reynolds in violation of the Labor Agreement. Such action would have created a chaotic personnel situation and would have led to grievances and eventually to further arbitrations to determine the scope of the exception or more accurately to determine whether the compulsory work clause had been waived.

To subject Respondent Reynolds to a situation where it would be unable to schedule overtime and be unable to meet its contractual commitments and/or where its Labor Agreement would again be subject to attack through the grievance procedure or through Title VII thus unnecessarily creating difficult relations with the Union and the employees, and at the same time incurring additional costs in terms of time lost reviewing grievances, costs of arbitration, etc., constitutes both serious inconvenience to and undue hardship on the conduct of Respondent Reynolds' business. The Guidelines do not contemplate further accommodation whereby Respondent Reynolds would obtain substitutes for employees with religious beliefs; Petitioner Dewey has been accommodated within the meaning of the Guidelines and the Petition consequently should be dismissed.

V.

THE DISCHARGE OF PETITIONER DEWEY WAS IN GOOD FAITH RELIANCE ON THE LABOR AGREEMENT.

Respondent Reynolds denies that it has committed any violation of Title VII under any construction of the statute. Respondent Reynolds asserts that its disciplining and discharge of Petitioner Dewey was in good faith reliance on the Labor Agreement between Respondent Reynolds and the Union and therefore Petitioner Dewey is not entitled to injunctive relief, back pay or reinstatement.

Section 706(g), as set forth in the Addendum to Brief (Page 61), specifies that if the court finds the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice, the court may enjoin respondent from engaging in such unlawful practice and order such affirmative action as may be appropriate, which may include reinstatement, with or without back pay. In a case involving the interpretation of Title VII, the United States District Court, District of Oregon, in *Richards* v. *Griffith Rubber Mills*, 300 F.Supp. 338 (1969), ruled that 706(g) as written requires a finding that "the respondent has intentionally engaged . . . in an unlawful employment practice" before the court "may" award relief. The court interpreted "intentionally" to mean wilfully and knowingly and inasmuch as the employer had relied on an Oregon Wage and Hour Commission regulation restricting females from lifting weights in excess of certain amounts, the court found no intentional violation and found no liability of the employer to the employee and further found an injunction inappropriate while citing *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Dodd* v. *Spokane County, Washington*, 393 F.

2d 330 (9th Cir. 1968). In support of finding no intentional violation of the Act, Respondent respectfully submits that no discrimination was found by the Michigan Civil Rights Commission, the Office of Federal Contract Compliance, the arbitrator chosen by Respondent and the Petitioner's bargaining agent — the UAW, the Regional Director of the Equal Employment Opportunity Commission in Cleveland nor the Sixth Circuit. In fact to find a violation the Equal Employment Opportunity Commission had to overlook its 1966 Guideline; the District Judge was obliged to also overlook said Guideline and apply a Guideline which came into effect ten months after Petitioner was discharged.

It is submitted that Respondent, Reynolds Metals Company, in assigning Petitioner Dewey to the Sunday overtime assignments pursuant to the compulsory work assignment clause and the seniority system, relied on the Labor Agreement. Consequently, there being no intentional violation there should be no liability on the part of Respondent and there should not have been issued by the District Court any injunction ordering Petitioner Dewey back to work with back pay.

VI.

BY PURSUING THE CONTRACTUAL GRIEVANCE-ARBITRATION PROCEDURE PROVIDED IN THE COLLECTIVE BARGAINING AGREEMENT TO FINAL DETERMINATION, PETITIONER DEWEY MADE A BINDING ELECTION OF REMEDIES WHICH PRECLUDED ANY ACTION IN A FEDERAL DISTRICT COURT UNDER THE CIVIL RIGHTS ACT OF 1964.

The issue raised by the above argument is the concurrent jurisdiction problem that arises in Title VII cases, i.e., jurisdiction under the statutory scheme and under the

grievance and arbitration system of a labor contract. When an employee has such a dual remedy, it has been proposed that while such an employee should be permitted to initiate such dual remedies, at some point a choice of election of remedies must be made. Title VII says nothing about the function of such grievance arbitration procedures and the resolution of employment disputes involving discrimination under Title VII. Thus the task of determining the legislative intent falls upon what the Third Circuit Court of Appeals describes as the sound application of judicial principles and precedents. *Fekete* v. *U. S. Steel Corporation*, 424 F.2d 331 (3rd Cir. 1970).

One of the early decisions bearing on whether or not an employee made a binding election of remedies by pursuing a complaint through the grievance arbitration process was *Bowe* v. *Colgate Palmolive Company*, 272 F.Supp. 332 (S.D. Ind. 1967). The District Court in *Bowe* concluded at page 338:

> "... [I]t is also the belief of the Court that the employee should not be permitted to proceed on the same allegedly wrongful incidents both in the Court and pursuant to his contractual remedies."

The reason for this requirement of an election was that it would be inequitable and unconscionable to subject the defendant to two series of extensive litigation, one in court and one under the labor contract. The next meaningful case was *Washington* v. *Aerojet-General Corporation*, 282 F. Supp. 517 (C.D. Calif. 1968). In this case the California District Court refused to go as far as the Indiana District Court in *Bowe* when it refused to apply a strict *ab initio* election of remedies concept. The California District Court went on to say that initially the grievant may pursue his remedies in both forums, but at some point a choice must

be made. The California District Court commenting on this matter said at page 523:

> "This point, as in the case of concurrent jurisdiction between State and Federal courts, is reached when a litigant has pursued his remedies in one forum to decision, be it by settlement, the decision of an arbitrator, or the decision of a judge."

The same California District Court in a most recent case, *Oubichon* v. *North American Rockwell Corp.*, 3 EPD ¶8071 (December 1970), again applied the doctrine of election of remedies in a contract grievance procedure-civil rights context, noting that the doctrine is based on the notion that an aggrieved party, while entitled to pursue his remedies both through grievance proceedings and through proceedings under the Civil Rights Act, should not be able to subject a defendant to multiple actions based upon the same claim, where as in *Oubichon*, he has pursued his remedies in one forum to a decision.

The first Circuit Court of Appeals to express an opinion was the Seventh Circuit in reviewing the lower court holding in *Bowe*, 416 F.2d 711 (7th Cir. 1969). That Court reversed the lower court on its position of a strict and *ab initio* election of remedies and stated that a plaintiff may utilize dual or parallel prosecution both in court and arbitration so long as election of remedy was made after adjudication so as to preclude duplicate relief which would result in unjust enrichment. There has been some dispute among the courts as to the meaning of the language of the *Bowe* Circuit Court of Appeals decision in that the California District Court in *Oubichon, supra,* reads the decision as being consistent with its holding while the dissenter in *Dewey* v. *Reynolds Metals Company,* 429 F.2d 324 (6th Cir. 1970) reads the decision

as indicating that the election of remedies doctrine doesn't apply.

The next Circuit Court to review the issue of election of remedies in this matter was the Third Circuit in *Fekete* v. *U.S. Steel Corp., supra.* In that case the Court noted that the Pennsylvania Federal District Court held that the Title VI court action was rendered moot by a labor arbitrator's decision. The Court interpreted the complaint filed in the District Court, however, as one seeking injunctive relief against an allegedly continuing course of discrimination which was unaffected by the arbitration decision. From this one would gather that so long as a grievant seeks relief not otherwise granted by another forum, no forum should be closed to him. In other words, it is applying concurrent jurisdiction with no election of remedies.

The next Circuit Court to express an opinion was the Sixth Circuit in *Dewey* v. *Reynolds Metals Company,* 429 F.2d 324 (6th Cir. 1970). This Court lined up with the California District Court in holding that the grievant may pursue his remedies in both forums but when he has pursued his remedy in one forum to a decision, the issue is moot in the other forum. In this regard the Court said in part (135a):

> "In arbitration proceedings, frequently questions of law and fact are resolved by the arbitrator. Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration.
>
> "This result could sound the death knell to arbitra-

tion of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street, *i.e.*, that the awards are binding on them but not on their employees.

"The tremendous increase in civil rights litigation leads one to the belief that the Act will be used more frequently in labor disputes. Such use ought not to destroy the efficacy of arbitration."

The Sixth Circuit went on specifically to note that the issue in the matter before the Court was as follows (136a):

"The question in our case is not whether arbitration and resort to the courts could be maintained at the same time; rather our case involves the question whether suit may be brought in court *after* the grievance has been finally adjudicated by arbitration." (Underscoring in original.)

Finally, the Fifth Circuit has expressed its views on the question. In *Hutchings* v. *United States Industries, Inc.*, 428 F2d 303 (5th Cir. 1970), the Fifth Circuit reversed a lower court holding which in effect followed the reasoning of the Sixth Circuit in *Dewey, supra*. The Fifth Circuit argued in part as follows at page 311:

"We begin by recognizing that determinations under a contract grievance-arbitration process will involve rights and remedies separate and distinct from those involved in judicial proceedings under Title VII...."

At page 312 thereof the Court said:

"At issue in the Title VII proceedings is the statutory right of employees or prospective employees not to be discriminated against on racial or other unlawful grounds regarding matters of their employment. In formulating relief once a violation has been found,

the trial judge is invested with wide discretion in modeling his decree to ensure compliance with the Act."

In continuing the Court said:

> "In the arbitration proceeding, then, the arbitrator's role is to determine the contract rights of the employees, as distinct from the rights afforded them by enacted legislation such as Title VII . . . The arbitrator, in bringing his informed judgment to bear on the problem submitted to him, may consider himself constrained to apply the contract and not give the types of remedies available under Title VII, . . ."

In short, the Fifth Circuit holds that the election of remedies theory is not applicable in the *Hutchings* matter although there is some recognition that there may be an application thereof to prevent a plaintiff from duplicating his relief which would result in unjust enrichment.

In the case before the Court, the first grievance of Petitioner, Trial Exhibit F (62a-63a), dated September 7, 1966, stated in part that the Company policy was "no more than discrimination against these men . . ." In the second grievance dated September 26, 1966, the Petitioner contended that the Company was using the rule to force people to work on Sunday against their religious and moral principles and stated: "We feel this is a clear case of discrimination on the part of the Company." Trial Exhibit H (65a). In the process of the arbitration in which Petitioner Dewey was represented by an International Representative of the United Automobile Workers, the Union suggested that the effect of the application of the Labor Agreement together with the substitute system was to "discriminate against those employees who seek to be excused from assigned work for reasons of religion." Trial Exhibit I (75a). The arbitrator in his resolution of the

grievance held that in his judgment "employees may not flatly refuse to work on these 'exceptional' Sundays in view of their obligations under the Agreement and the Company's consistent administration of the relevant provisions" (76a). The arbitrator went on to say (76a-77a):

> "Suppose that an employee decided to join a religious organization with a Wednesday Sabbath, and that he thereafter refused to work on Wednesdays. It would be obvious, I think, that the Company could properly find this employee in violation of Rule 11; yet, the language of the Agreement makes no distinction for this purpose between straight time and overtime work assignments."

The arbitrator went on to find that the Petitioner, under all the circumstances, had an obligation to utilize the established replacement procedure and that he considered it to be misconduct under the Agreement for them to refuse to do so. The arbitrator added (78a):

> "An important commitment arising out of one's religious convictions and obligations can provide a 'substantial and justifiable reason' for excusing an employee from some particular work assignment, on a Sunday or on some other day. What I found here, however, is that the Agreement does not permit a regular and continuing refusal of all Sunday work on religious grounds. I will therefore not sustain the grievances."

What should be the basis for the decision of this Court in this matter? Should it be predicated on the election of remedies doctrine in an effort to eliminate multiple actions based upon the same claim, or is it the rationale of the Fifth Circuit which states that the rights and remedies under the two procedures are separate and distinct and as such there can be no election of remedies. The latter is the

position of the Petitioner set forth at page 30 of his Brief wherein he says that when the issues or rights litigated in two separate actions are separate and distinct, the doctrine of election of remedies is inapplicable. Close observation, however, will reveal that in the present matter the right that was alleged in the grievances that were disposed of in the arbitration was bottomed on allegations of religious discrimination to the effect that Respondent was forcing employees to work on Sunday against their religious and moral principles. The arbitrator found that the employees could not refuse to work on Sundays in view of their obligations under the Labor Agreement and the Respondent's consistent administration as to all employees of the relevant provisions of said Agreement (76a). The Civil Rights Act as related to religion and employment raises the issue as to whether an employee is treated differently as to other employees on the basis of religion. It is submitted that the rights or issues in the arbitration and Civil Rights action are not distinct, rather they are common. The remedies available under the arbitration system consist of, among other things, reinstatement and back pay, and the fact that a decision acts as a precedent as to future cases. This is the nature of the remedy which is available in Title VII and in fact is the remedy that was employed by the District Court in this matter. It is submitted, with all due respect to the holding of the Court in *Hutchings, supra,* that the analysis as to the differences in rights and remedies in the two procedures is not correct. The rights and remedies are common and it is submitted that the election of remedies doctrine is applicable. Thus the better judicial principle would be that enunciated by the Sixth Circuit and the Federal District Court in California requiring that a grievant may pursue his remedies

in both forums but when he has pursued his remedy in one forum to decision, the issue is moot in the other forum.

The problem that exists in this situation is one that arises where you have national policy of free collective bargaining and binding arbitration which in turn has to vie with uniform federal regulations for the power to control industrial behavior. The creation of Title VII by Congress with complete silence as to the interplay of the grievance-arbitration procedure and the jurisdiction of the federal courts creates another power struggle. The policy as enunciated by the Petitioner and by the United States in its Brief advocates concurrent jurisdiction for arbitrators and federal judges. To do so seemingly avoids the necessity of the United States taking a position as to the relative priority to be assigned to two important, but sometimes conflicting, national policies. But let us look at the possible operation of concurrent jurisdiction. It is fairly obvious on the basis of the present case that it would work poorly, bringing waste, confusion, forum shopping, and double jeopardy. It might even undermine the integrity of collective bargaining and arbitration in the sense suggested by the Sixth Circuit. The Sixth Circuit saw that the application of the concurrent jurisdiction principle in these cases brings about a result whereby an employer is bound by an arbitration decision whereas an employee could continue to litigate. This could result in the death knell of arbitration of labor disputes, a procedure which has been the safety valve in the relationship between management and labor for many years in this country.

The holding of the Sixth Circuit in this matter is compelling not only by reference to principles dealing with the sound and equitable administration of justice but also by reference to the well established federal policy in favor

of resolving industrial disputes through the grievance procedure of a collective bargaining agreement. Starting with *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448 (1957), the Steelworkers Trilogy, (*United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)), this Court has emphasized the importance of the voluntary settlement of labor disputes through the vehicle of arbitration. As was pointed out in *Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970), *Lincoln Mills, supra*, in its exposition of Section 301(a) "went a long way towards making arbitration the central institution in the administration of collective bargaining contracts." In any event, it is difficult to understand why this Court should now accept Petitioner's contention that it subordinate the "central institution" which its decision have done so much to strengthen, in this case, where the alleged rights and remedies involved are in every substantial respect identical in both forums and where relitigation affords the disappointed suitor the benefits of forum shopping with none of its disadvantages.

It is submitted that Petitioner, having here elected to pursue his grievance against Respondent Reynolds under the Collective Bargaining Agreement in which the nature of the issues and the relief sought are identical with those in this action, and having so pursued it to the process of arbitration in which he participated, and concluding with the decision of an arbitrator, must now be held to have made a binding election of remedies and consequently such a Petitioner should be barred from proceeding in this action.

CONCLUSION

It is the position of Respondent, Reynolds Metals Company, that:

1. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of religion as to employment. The compulsory work provisions of the Collective Bargaining Agreement provided a fair and equitable method of distributing a heavy workload. The work provisions were adopted in good faith, are neutral and were negotiated as a business necessity to enable the plant to operate in certain overtime situations such as Saturday and Sunday.

2. The assignment of overtime on various Sundays, pursuant to the Collective Bargaining Agreement and in particular to the seniority system therein, resulting in different employees working Sundays from time to time, falls within an exception to the Civil Rights Act of 1964.

3. While the Civil Rights Act of 1964 prohibits discrimination in employment because of religion, there is no legal basis to support a requirement of accommodation as established by the Equal Employment Opportunity Commission. Such a requirement possibly violates the Establishment Clause of the First Amendment to the United States Constitution.

4. The 1966 Guidelines of the Equal Employment Opportunity Commission interpret the Act to mean an employer would not be in violation thereof if he established a normal work week applicable to all employees even though such a schedule might not have a uniform effect on all employees. Respondent, Reynolds Metals Company, complied with and relied upon this Guideline and such compliance is a bar to this action.

The replacement system established by Respondent,

Reynolds Metals Company, complies with the 1966 and 1967 Guidelines.

Any further accommodation is not required by the Guidelines and would seriously inconvenience the conduct of Respondent's business.

5. Since rights and remedies sought in the grievance-arbitration system are identical with those sought in Title VII action at law, the election of remedies doctrine applies and Petitioner Dewey should not be allowed to pursue the law action after obtaining a decision in arbitration.

In view of the foregoing, it is respectfully requested that this Honorable Court conclude that:

Respondent, Reynolds Metals Company, has not discriminated as to Petitioner Dewey because of his religion within the meaning of Title VII of the Civil Rights Act of 1964;

And accordingly order that:

a. Relief is not in order and a Judgment be entered dismissing the Complaint.

b. The District Court Judgment of July 25, 1969 Granting Permanent Injunction And Reinstatement, Credit For Seniority And Fringe Benefits And Back Pay be rescinded forthwith.

c. The Respondent, Reynolds Metals Company, be permitted to forthwith cancel the Supersedeas Bond in the amount of Fifteen Thousand Dollars ($15,000.00), which bond was ordered by the District Court under date of July 25, 1969.

d. Petitioner Dewey's request for the costs of this proceeding including attorney's fees be denied.

Respectfully submitted,
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DATED: April 5, 1971

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ADDENDUM

Title VII of the Civil Rights Act of 1964

Section 703(a)(1)
(Title 42 USC Section 2000e-2(a)(1)):

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual; or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Section 703(h)
(Title 42 USC Section 2000e-2(h)):

> "(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer

if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

Section 706(g)
(Title 42 USC Section 2000e-5(g)):

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a)."

Section 713(a)
(Title 42 USC Section 2000e-12(a)):

"(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act."

Section 713(b)
(Title 42 USC Section 2000e-12(b)):

"(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title."

Equal Employment Opportunity Commission

RELIGIOUS DISCRIMINATION GUIDELINES

(Effective June 15, 1966)

(31 F.R. 8370)

"Section 1605.1 Observance of Sabbath and religious holidays.—(a)(1) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular work week. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.

"(2) The Commission believes that the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business.

"(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday.

"Likewise, an employer who closes his business on Christmas or Good Friday is not thereby obligated to give time off with pay to Jewish employees for Rosh Hashanah or Yom Kippur:

"(b) While the question of what accommodation by the employer may reasonably be required must be decided on the peculiar facts of each case, the following guidelines may prove helpful.

"(1) An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another.

"(2) An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.

"(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs.

"(4) Where an employee has previously been employed on a schedule which does not conflict with his religious obligations, and it becomes necessary to alter his work schedule, the employer should attempt to achieve an accommodation so as to avoid a conflict. However, an employer is not compelled to make such an accommodation at the expense of serious inconvenience to the conduct of his business or disproportionate allocation of unfavorable work assignments to other employees."

Equal Employment Opportunity Commission
RELIGIOUS DISCRIMINATION GUIDELINES

(Effective July 10, 1967)
(32 F.R. 10298)

"Section 1605.1 Observance of Sabbath and other religious holidays.—(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

RICHARD M. DAWSON

v. Civil Action

J. G. MIZELI No. 528-70-R

MEMORANDUM

Jurisdiction of the Court is attained by virtue of Title 28 U.S.C.A. §§1531(a), 1539, and 1936(a)(2).

Plaintiff, a member of the Seventh Day Adventist Church whose tenets preclude labor on their Sabbath Day, which is from sundown Friday until sundown Saturday, is an employee of the United States Post Office Department in the capacity of a regular carrier.

Defendant, Mizell, is the Post Master of the Post Office in Richmond, Virginia, wherein plaintiff is employed.

From the pleadings, stipulations and evidence introduced before the Court, the Court finds that the plaintiff commenced his employment with the Post Office in June of 1966 as a temporary substitute carrier. Subsequently his employment was converted to a career appointment as a regular city carrier. The Post Office operates under an agreement between the United States Post Office Department and certain organizations of employees of the Post Office Department, which agreement calls for bidding for work assignments on the basis of seniority. As a practical result, when a vacancy in a position occurs, same is posted, mail carriers submit their applications for same, and award of the position is made on the basis of seniority.

At the time of plaintiff's initial employment, he was not a member of the Seventh Day Adventist Church but became

so on May 9, 1970, although he had for some time prior thereto been observing the tenets of the church. There is no doubt of the plaintiff's conscientious and sincere belief in the teachings of his church.

By reason of his lack of seniority, plaintiff now finds himself assigned to a position which requires that he work on Saturday. In an effort to maintain his position consistent with his religious beliefs, plaintiff instead of working on the Saturdays on which he was scheduled to work took those days off and they were charged against his accrued annual leave or charged as leave without pay.

On May 4, 1970, plaintiff was advised that he would be discharged from the postal service by reason of his excessive absences, to-wit: five Saturdays during the months of February, March and April of that year.

On October 2, 1970, a temporary restraining order was entered enjoining the defendant from removing the plaintiff from his position in the Post Office Department, Richmond, Virginia, for failure to perform work on Saturdays by reason of his religious convictions. This order was subsequently thereto elevated to a preliminary injunction pending the outcome of this litigation.

The Court finds that plaintiff attempted to secure relief through the local union, but was unsuccessful. Under the agreement between the Post Office and the unions, any deviation of same is a violation, except that the Post Master may make temporary assignments.

The defendant herein, in an effort to cooperate with the plaintiff, investigated and was advised that any temporary assignment of this plaintiff would be objected to by the union.

There are 1865 employees in the Post Office system in

Richmond. Of these employees, 381 are regular letter carriers, of whom 304 are assigned to work on Saturdays. A little more than a third of the employees in the system work on Saturdays.

There is available to the plaintiff the opportunity to transfer from a regular carrier to a substitute carrier, which would render to him the same amount of money that he is now paid, but would result in the loss of certain of his seniority privileges, which the plaintiff is understandably reluctant to do.

The Court finds that the work of the Post Office requires that mail be processed on a seven day a week basis.

The Court finds that the seniority provisions of the agreement between the Post Office and the unions are some of its more valued aspects. The agreements under which the Post Office works affect approximately 700,000 employees throughout the United States.

The plaintiff seeks relief from the defendant's intention to discharge him by reason of his inability to work on Saturdays.

The Court finds that the assignment by defendant Mizell of the plaintiff to a position resulting in his having Saturdays off would be violative of the spirit as well as the substance of the agreement under which the Post Office employees work.

Plaintiff contends that defendant's contemplated removal of the plaintiff from the postal service by reason of his declining to work from sundown on Fridays until sundown on Saturdays would impose, under the circumstances of this case, a burden of the free exercise by plaintiff of his religion.

The Court concludes that there is no constitutional prohibition against the defendant insisting that plaintiff either agree to perform the duties assigned to him or suffer the consequences. This Court cannot agree with the suggestion of counsel that there would be little, if any, adverse effect on the federal interest in the operation of the Post Office Department and the delivery of the United States mail at Richmond, Virginia, resulting from the assignment of plaintiff to a six day work week with Saturday as a day off. True, the mere granting to plaintiff Saturdays off would not, in and of itself, affect the operation of the Post Office; but the Court cannot overlook the fact that approximately 700,000 people are governed by the agreement which plaintiff suggest the defendant violate.

There can be no doubt from the evidence before this Court, indeed from the plaintiff's own testimony, that the seniority rights contained in the agreement are of the utmost importance to the employees.

The Court finds no infringement of plaintiff's rights concerning his religious beliefs. Religious discrimination should not be equated with failure to accommodate.

Since 1878 it has been recognized that the First Amendment cannot be interpreted as an absolute prohibition on the part of the government from interfering with the exercise of religion. The religious freedom guaranteed under our Constitution was that one could be assured that the legislature would make no law respecting the establishment of religion or prohibiting the free exercise thereof. See *Reynolds* v. *United States*, 98 U.S. 145 (1878). Since the *Reynolds* case it has been recognized that religious practices are subject to reasonable government interference under certain conditions and circumstances.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." As a consequence, simply stated we have two religious clauses, one pertaining to "free exercise" and the other pertaining to the "establishment" of religion. The free exercise clause undoubtedly bars regulation of religious beliefs or interference with the dissemination of religious ideas. Its purpose is to prohibit misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect." *Gillette* v. *United States*, 39 U.S.L.W. 4305, decided March 8, 1971, quoting from *Braunfeld* v. *Brown*, 366 U.S. 599, 607.

Undoubtedly any burden on First Amendment values must be justifiable in terms of a government's valid aims. Having concluded that in order to accommodate plaintiff's request to select his day off would require a violation on the part of defendant of a binding contract affecting 700,000 people, it is obvious that any incidental burden felt by the plaintiff is certainly justified when one considers that it would be literally impossible to accommodate the religious preference of every employee of the Post Office Department. As stated by Mr. Chief Justice Warren in *Braunfeld, supra,* ours is a cosmopolitan nation "made up of people of almost every conceivable religious preference. These denominations (sic) number almost three hundred . . . Consequently it cannot be expected, much less required, that legislators enact any law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions." In *Braunfeld, supra,* the court upheld the validity

of a statute forbidding the retail sale on Sundays of certain commodities.

In addition, it should be noted that the central purpose of the establishment clause is to insure government neutrality in matters of religion. The rule of seniority as called for under the Post Office's agreement cannot, by any stretch of the imagination, be deemed to discriminate on the basis of religious affiliation or religious belief. All that the establishment clause requires is that when government activities touch on the religious sphere "they must be secular in purpose, evenhanded in operation, and neutral in primary impact." *Gillette* v. *United States, supra.*

Plaintiff contends that the Court is bound by the rule laid out in *Sherbert* v. *Verner,* 374 U.S. 398. In that case appellant was a member of the Seventh Day Adventist Church who lost her position with a private employer by reason of her refusal to work on the Sabbath Day of her faith. Unable to obtain other employment because from conscientious scruples she would not take said work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. That act provided that to be eligible for benefits, a claimant must be "able to work and . . . available to work," and further that a claimant is ineligible for benefits if he has failed, without good cause, to accept available suitable work when offered him by the employment office or the employer. The South Carolina administrators held the appellant to be ineligible for benefits. Appellant's argument before the respective courts was to the effect that the provisions of the South Carolina law abridged her right to the free exercise of her religion secured under the free exercise clause of the First Amendment through the Fourteenth Amendment. The

United States Supreme Court, speaking through Mr. Justice Brennan, stated that for appellant's constitutional challenge to be withstood, it must rest either because her disqualification as a beneficiary represented no infringement by the state of her constitutional right of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by "compelling state interest in the regulation of a subject within the state's constitutional power to regulate. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438;" See also, *Bates* v. *Little Rock*, 361 U.S. 516, 524.

It should be noted that in the *Sherbert* case it was pointed out that the law of South Carolina expressly saved the Sunday worshiper from having to make the kind of choice which was imposed upon the appellant in that case. Not so in our instant case. There is no evidence of any blanket permission to those who believe Sunday to be the Sabbath to be relieved from work. The holding in *Sherbert* was limited to a finding that a state "may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." That holding, paraphrasing the words of Justice Brennan, merely reaffirmed the principle to the effect that no state may exclude members of any faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.

There is nothing in the instant case which suffers the plaintiff to be excluded from any rights because of his faith. The Court finds no action on the part of the Post Office Department which interferes with plaintiff's right to exercise his religion as he sees fit. The fact that no regular mail

deliveries are scheduled on Sunday, the Court finds, is attributable to the fact that the business community dictates the workload. The Court does not find *Sherbert* v. *Verner, supra,* to be apropos in the instant case. In that case the individual was discriminated against in allowance of a public benefit, as distinguished from the instant case.

It is true that there is, to a certain extent, a burden imposed on the plaintiff Dawson in reference to the exercise of his religious belief, to the extent that as a result of the defendant not accommodating the Post Office work schedule to coincide with plaintiff's exercise of his religion, the instant unfortunate situation is created. But as heretofore stated, accommodation cannot be equated with discrimination. While the Court does not find that any burden imposed upon the plaintiff Dawson is constitutionally prohibited, even were the Court to find that the free exercise and establishment clauses were brought into play in the instant case, it can hardly be argued that there is not a compelling governmental interest in the Post Office entering into an agreement providing for seniority rights; for as a corollary to those rights the Post Office is assured of adequate personnel in the movement of the mail. The burden on this agency of the government to accommodate its pattern of work to the special requirements of each individual's religion would result in a chaotic and impossible situation.

Plaintiff's contention that the actions of the defendant are prohibited by the 1964 Civil Rights Act by virtue of Executive Order No. 11478, August 8, 1969, has no validity in the instant case.

As sympathetic as the Court may be with the plaintiff's

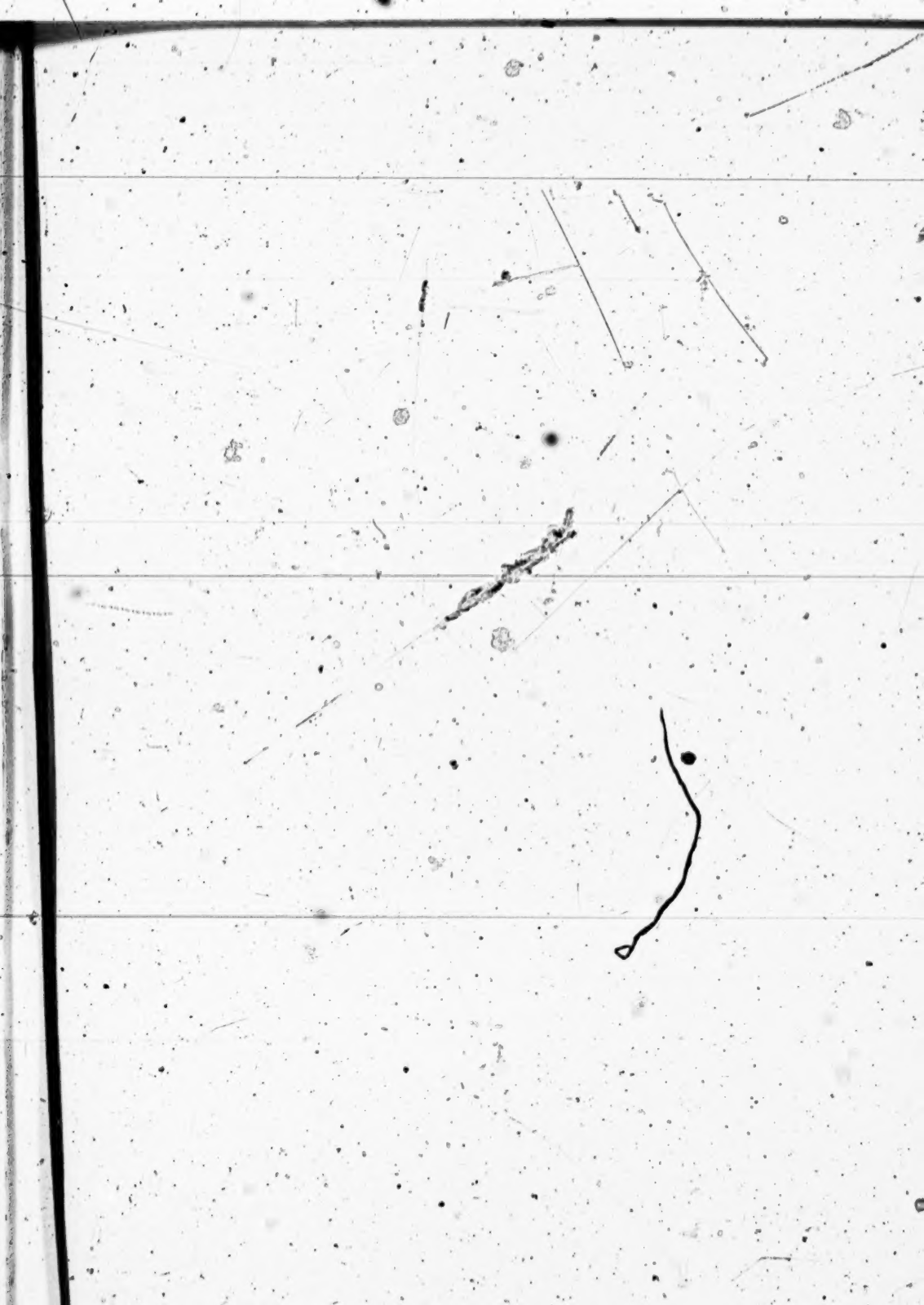
predicament, the Court finds no violation on the part of the defendant of any constitutional right of the plaintiff, and the injunction heretofore entered must be dissolved.

An order consistent with these findings will be entered.

.....

United States District Judge

March 24, 1971.



MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY, *Petitioner*

v.

REYNOLDS METALS COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND BRIEF

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Chamber of Commerce of the United States of America (hereinafter referred to the "National Chamber") moves for leave to file the attached brief *amicus curiae* in support of the respondent Reynolds Metals Company. Pursuant to Rule 42(3) of the Revised

Rules of this Court, consent to the filing of this brief was requested of the parties. Counsel for Petitioner agreed. Counsel for Respondent stated that it would neither consent nor withhold its consent but left such matter to the discretion of the Court.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

The issues in the instant case—religious accommodation by employers and election of remedies by employees with claims of alleged discrimination are matters of significant national concern. Virtually all employers, in all parts of the country, are engaged in interstate commerce and come within the provisions of Title VII of the Civil Rights Act of 1964. Further, a substantial number of these employers have collective bargaining agreements containing both no-discrimination clauses as well as grievance and arbitration procedures to resolve disputes arising under such agreements.

The major issue—that of Congressional intent relative to the claimed requirement of religious accommodation—has not been briefed by Petitioner or the *amici* in support of his position and thus the issue is not properly presented for the Court's consideration. Accordingly the interest of the National Chamber, in the outcome of this litigation, is vital and it requests leave to file this brief as amicus curiae urging affirm-

ance of the decision below, predicated on the substantial and far-reaching consequences that the result in this case will have for American industry.

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IN THE

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMICUS CURIAE

I. STATEMENT OF THE CASE

This case is before the Court following extensive investigation and litigation before a wide variety of State and Federal administrative agencies, private voluntary labor arbitration and the lower Federal Courts. The facts underlying Petitioner's claim as well as a descriptive history of the prior investigation and liti-

gation are fully and amply set forth in the brief of Respondent Reynolds Metals Company. No useful purpose can be served by repeating it here except to point out, in an overview comment, that five of the seven tribunals that reviewed the facts and the law as to Petitioner's claim of religious discrimination under the Statute rejected his contention, several also asserting that he has had a complete adjudication of his rights in the forum of arbitration.

II. THE QUESTIONS PRESENTED

1. Whether under Section 703(a)(1) of the 1964 Civil Rights Act an employer is required to accommodate his business operations to conform to his employees' personal observance of individual religious practices?

2. Whether an employee who has sought arbitration of his claim for alleged wrongful discriminatory action in breach of a collective bargaining agreement is barred from bringing suit under the 1964 Civil Rights Act on the same claim after it has been adversely decided to him in the arbitration proceedings?

III. ARGUMENT

A. THE STATUTE IS DESIGNED TO PROHIBIT RELIGIOUS DISCRIMINATION—NOT ACT AS A VEHICLE FOR RELIGIOUS ACCOMMODATION

The Petitioner's brief as well as that of the *amiciae* in support of his position have all proceeded on the basis of an assumption of law not warranted by either the express language or the legislative history of the applicable statute.

The Court is presented with the instant case in the context of a refusal of an employer to make efforts—

reasonable or otherwise—to accommodate his business operations to the personal observance of individual religious practices by persons in his employ. Failure or refusal to do so, claims Petitioner and his supporters, constitutes religious discrimination, *per se,* in violation of Section 703(a)(1) of the 1964 Civil Rights Act.

We submit this context begs the question and is designed to lead the Court to view this case within a perimeter that is non-existent.

The threshold question ignored by the Petitioner which the Court must address itself to first is whether or not the legislation enacted by Congress intended to require the type of accommodation assumed herein by Petitioner. For the reasons set forth below the *amicus* submits that no such construction of the statute can be supported either by the express language or the legislative history. Further such argument if accepted by the Court will compel the Act to fall as violating the prohibitions of the First Amendment respecting establishment of religion for the true irony of Petitioner's contention, under close scrutiny, actually constitutes a proposition in favor of a form of "inverse religious discrimination" in violation of the Federal Constitution.

1. The intent of Congress was not to otherwise interfere with the normal operation of business in general

The legislative history of the Act confirms that it was aimed at ending discriminatory practices and artificial barriers that impeded persons from achieving equality of employment opportunity. As the Chief Justice observed speaking for this Court recently in

Griggs v. *Duke Power Co.*, —— U.S. ——, 39 LW 4317, 4319, 3 FEP Cases 175, 177 (1971):

> "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment. . ."

Nowhere in the Act is there language that begins to suggest that employers are to revamp or restructure their business operations to meet limitations and conditions laid down by individual employees working for them.

On the contrary the legislative history is expressly the opposite as the debates in the Congress confirm:

> "Similarly management prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." 1964 U.S. Code Cong. & A. News, pp. 2516.

What Petitioner is urging on the Court is that he is entitled to present his employer with a variety of conditions attached to his availability for work and that unless the employer meets those conditions the employee *per se* is a victim of discrimination. The Court has, in essence, rejected this contention: "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications." *Griggs* v. *Duke Power Co., supra* at —— U.S. ——, 39 LW 4319, 3 FEP Cases 177.

We submit, on the converse, that it is the employee who must be prepared to meet the job conditions

set forth by the employer and that the latter is entitled in the freedom of the labor market to specify its desires, provided that in so doing it does not create job conditions or requirements which cannot be fairly met on an open basis.[1]

Accommodations of employee religious beliefs frequently cannot be made without disruption of work schedules and development of inequitable personnel practices which may well have an adverse effect on employee morale. Many industries, such as petrochemicals, steel, aluminum, nonferrous metals and paper and allied products, are engaged in "continuous process" operations. Shift stability in "continuous process" industries is essential to avoid slowdowns, back-ups or wasted manpower and material. These industries operate 24 hours per day, 7 days per week, and require a stable work schedule of three 8-hour shifts. Entire shifts are rotated at intervals so that all employees work day as well as evening shifts on an equal basis.

Senators Clark and Case observed in their interpretative memorandum submitted jointly as Floor Managers of the House approved bill:

> "This exception [relating to the bona fide occupational qualifications] must not be confused with the right which all employers would have to hire and on the basis of general qualifications for the job, such as skill or intelligence."[2]

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[1] This latter condition was the vice condemned by the Court in *Griggs*.

[2] 110 Cong. Record 7213.

The *amicus* herein submits that under the legislative history availability for work on the same basis as other employees in the plant constitutes a primary employment requirement that is reasonably necessary to the normal operation of business enterprise. An employer can require that all of his employees meet minimum performance standards. *Phillips* v. *Martin Marietta Corp.*, —— U.S. ——, 39 LW 4160, 3 FEP Cases 40 (opinion of Marshall J. concurring).

It is thus clear that Congress did not intend the Civil Rights Act to exert an influence causing wholesale disruption of business throughout the country. Rather it desired an end be brought to those artificial practices that barred the avenue of economic opportunity to all Americans. The mainstream of the legislation was directed toward eliminating practices considered inimicable to the exercise of the rights of all citizens regardless of race, creed, color, sex, national origin and religion. For the Court to effect a transformation of this desirable piece of social legislation and create substantial upheaval of uniform, nondiscriminatory and orderly business practices would be indeed unfortunate.

2. The Civil Rights Act does not grant individuals the power to require other persons, including employers, to conform their ways to such individuals' religious beliefs

Section 703(a)(1) of the Civil Rights Act in relatively straightforward language provides *inter alia*, that an employer shall not discriminate against his employees because of their religion. Simply stated this means that no employer shall single out any particular employee because of his religious beliefs and attempt to treat him, for this reason alone, on a disparate

basis to his other employees. This is both a desirable and manifestly fair principle of social justice.[3]

However, this doctrine in the Petitioner's hands has been inverted to support the contention that employers in the operation of their businesses must take into account the religious belief of each individual employee and accommodate the mechanics of such operations to ebb and flow around the vagaries of such practices.[4] Contrary to Petitioner's assertion, that such was intended within the plain meaning of the statute is far from obvious. As Circuit Judge Weick stated in the Sixth Circuit's opinion below on rehearing:

> "Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious belief of another." *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 334, 2 FEP Cases 868, 870.

Despite the fact that both opinions of the Circuit Court below rely extensively on the legislative history of the Act, Petitioner's brief, at no point cites any such history in support of his construction of the statute. Indeed he cannot for the entire scope of such history furnishes no documentary support of his argument here. The same is true of the briefs filed by the *amici curiae* in support of Petitioner.[5] Rather they

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[3] Respondent Reynolds concedes it does not question Dewey's right to follow the beliefs of his Church.

[4] As discussed *infra*, this places a well nigh, impossible practical burden on employers with large work forces having a wide cross section of religions represented.

[5] This should lead the Court to examine with great care Petitioners' "reading" of the statute.

rely upon the pronouncements of the Equal Employment Opportunity Commission. It was the Congress, however, that enacted the legislation in question not the Commission and it is to the former—not the latter—that this Court should look for guidance.

In short Dewey comes forward with *no* authority, save the EEOC itself[6] to support his reading of Section 703(a)(1). We submit that the construction of the statute by the Circuit Court below was correct and susceptible of no other reasonable interpretation. We further submit that no clearer statement of where Petitioner has gone wrong in this case can be found than in the Circuit Court's opinion on rehearing:

> "The fundamental error of Dewey and the *Amici Curiae* is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different." supra at 429 F.2d 335, 2 FEP Cases 871.

It is one thing for an employer to adopt a policy that it will not hire persons of a particular religious persuasion or, if they are employed, to inhibit their upward mobility within the Company. This the *amicus* here submits is an example of the type of religious discrimination Congress intended to proscribe under Section 703(a)(1). It falls far short of the arguments of Petitioner that the failure or refusal to adjust or rearrange uniform work practices likewise constitute an act of affirmative discrimination within the meaning of the statute.

So long as Reynolds is not selecting from among its employees, based upon their religious beliefs, it

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[6] Since the Act and its legislative history do not support the Commission's construction their "guidelines" here are not entitled to any deference. Cf. *Griggs* v. *Duke Power, supra.*

has not acted in a discriminatory manner in violation of the law. In no proper sense under the facts of this case can it be said that Reynolds discriminated against Dewey on the basis of his religious beliefs for Reynolds' policy is not one which either on its face—or in its effect—affirmatively discriminates against religion whether it be Dewey's or any other employee's working at the plant.

Dewey, in reality, is asking that he be singled out for special treatment *because of* his religion, from all the other employees at the plant. This result would appear to be the very antithesis of non-discriminatory treatment and was the opposite of the result sought by Congress in enacting the legislation. "Discriminatory preference for any group, minority or majority is precisely and only what Congress proscribed." *Griggs* v. *Duke Power Co., supra.* p. 39, LW 4319, 3 FEP Cases 177.

The Court below expressed the conclusion that employers ought not to be forced to accommodate each of the varying religious beliefs and practices of its employees. This makes plain sense. To hold otherwise is to conjure up a constant parade of workers from various religious backgrounds, coming and going to work on this day or that, depending upon their religious belief.

As Justice Douglas pointed out in his concurring opinion in *Sherbert* v. *Verner,* 374 U.S. 398, religious scruples of Moslems require them to attend a mosque on Friday and to pray five times daily; at pp. 411. Sabbatarians observe Saturday. Dewey respects Sunday. Can a line truly be drawn here?

This Court has only recently denied review of a case where that very proposition was recognized as being at the core of the controversy. *Stimpel* v. *State Personnel Board of the State of California,* 85 Cal. Rep. 797, 6 Cal. App. 3d 206 (1970), cert. den'd. Docket No. 701, 27 L. Ed. 2d 258 (Dec. 7, 1970).

The facts in *Stimpel* were virtually identical with those in the instant case except that the State of California was the employer as opposed to a private business concern. The California Court well envisioned the practical aspects of embracing a doctrine of wholesale religious accommodation:

> "The proliferation of religions with an infinite variety of tenets would, if the State is required as an employer to accommodate each employee's particular scruples, place an intolerable burden upon the State. We conclude that if a person has religious scruples which conflict with the requirements of a particular job with the State, he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties." *Supra* at 6 Cal. App. 3d 209-10.

Nor it is an answer for the Petitioner to argue as he does that the worker is being compelled to choose between working and his religion. He is not being required to abandon his religious beliefs and nothing prevents him from seeking a job with no Sunday work.[7] To hold that all employers must make jobs available on *his* terms, i.e., consistent with his particular religious beliefs was never intended by Congress, would constitute a totally unwarranted enlargement of the statute, and for the reasons set forth below,

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[7] This is a more rational type of "accommodation" than the one urged by Petitioner and places the burden in the right place.

constitute a violation of the Establishment Clause of the First Amendment.

3. Compliance with the EEOC's guidelines presents serious practical problems to employers, employees, and job applicants

As earlier pointed out, the inherent nature of certain basic industries requires them to operate on a round the clock basis. Accommodations of employee religious beliefs frequently cannot be made without disruption of work schedules and development of inequitable personnel practices which may well have an adverse effect on the morale of other employees.

Further, in practical effect, will employers have to survey each and every employee and job applicant to discover his religious practices?[8] Moreover, the mere questioning of the employee concerning the sincerity of his beliefs which seems appropriate under the proposed rule, is a gross invasion of privacy. If, for example, an employee or job applicant refuses to divulge his religious tenets on personal grounds does he waive his right to an accommodation by the employer? Should an employee undergo a conversion of beliefs after hiring, must he be compelled to "register" his beliefs with his employer to insure the future accommodation of his newly-acquired religious beliefs? It is submitted that both employers, employees and job applicants will be subjected to onerous burdens of both conscience and compliance under the Commission's Guidelines.[9]

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[8] For example, does he possess religious beliefs and if so what holidays or restrictions on his work availability are liable to be present.

[9] The Court should also be aware that there are an infinite variety of problems also created under seniority clauses in union contracts too numerous to mention here.

However the will of Congress can be clearly seen in the interpretive Memorandum of Title VII prepared by Senators Clark and Case:[10]

> "It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and *has no hidden meaning. To discriminate is to make a distinction, to make a difference in treatment or favor,* and those distinctions or differences in treatment or favor which are prohibited by Section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex and national origin. *Any other criterion or qualification for employment is not affected by this title.*" (emphasis supplied) 110 Cong. Record 7213.

In the case before the Court, there is not the slightest suggestion that the *employer* made any distinctions or differences in treatment. On the contrary it was Dewey, the employee, who was separating himself from the rest of the Company's work force. The employer did not enforce a rule which required work on Sunday. Rather, he enforced a rule which required employees to work whenever they were scheduled, *regardless of the day of the week.*[11] Thus, the employer truly made no distinction; employees were required to work whether they celebrated the Sabbath on Saturday, Tuesday, or Sunday. All employees were literally treated exactly the same under the provisions of a justifiable rule in a bona fide collective bargaining agreement.[12]

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[10] This is the very same source which the Court accorded great weight in its *Griggs* decision.

[11] This of course would have also affected any members of the Mosiem faith working at the plant.

[12] The only possible basis for a claim of discrimination would be if the otherwise valid rule were discriminatorily applied to only a certain group. Such a claim, however, is not present here.

Under these circumstances there is no discrimination within the meaning of the Act present here. It is only when "discrimination" is, by means of the alchemy of the EEOC, converted into "failure to accommodate" that the Petitioner's claim emerges. Such result however goes far beyond the intent of Congress as expressed in the Act and its legislative history. Accordingly, it must be rejected and correspondingly Petitioner's claim falls of its own weight.

4. The EEOC guidelines, if approved, render the statute unconstitutional

Assuming *arguendo* the Court finds the religious accommodation requirement was mandated by Congress, the Court is then faced with a serious Constitutional barrier.

The First Amendment is quite explicit and its intent well known to this Court. Its basic philosophy as regards religion is simple. The state will establish, favor, or support no religion. This Court expressed such philosophy in *McGowan* v. *Maryland*, 366 U.S. 420, 443, 6 L. Ed. 2d. 393, 406 (1961) reiterating that under the First Amendment the Federal Government cannot "pass laws which aid one religion, aid all religions or prefer one religion over another."

Neither support nor hostility, but neutrality is the goal of the religion clauses of the First Amendment. *Gillette* v. *United States, et al*, — U.S. —, 39 LW 4305 (1971).

In the instant case Congress violates its obligation of neutrality if it mandates that Reynolds accommodates the operation of its plant to the religious beliefs of Dewey or any other employee working there.

As Justice Marshall, speaking for the Court in *Gillette* observed:

> "... but the Establishment clause stands at least for the proposition that when government activities touch on the religious sphere they must be secular in purpose, evenhanded in operation and neutral in impact." *Supra,* 39 LW 4309.

While Petitioner relies heavily upon *Sherbert* v. *Verner, supra,* his case here does not quite reach the purview of the Free Exercise clause of the First Amendment for, in fact, nothing has been done either by Reynolds or the government to impede or otherwise infringe upon Dewey's *right* to believe in his church or any of its tenets. However, in asking the support of the government under Title VII, to compel other persons, such as Reynolds, to accommodate their ways to the pattern of his religious beliefs, he necessarily calls for the involvement of government to a degree that squarely contravenes the ban of the Establishment Clause. The Court, however reluctantly, must decide against him. To do otherwise is to condone government involvement in matters of religion to a point with no visable limitations.

Within the framework of reference alluded to by Justice Harlan in his concurring opinion in *Walz* v. *Tax Commission,* 397 U.S. 664, the degree of involvement sought by Dewey here would be a "continuing one calling for official and continuing surveillance leading to an impermissable degree of entanglement." *Supra* at p. 705. For as Justice Harlan had concluded:

> "In determining whether a particular government action breaches the establishment clause prohibition we must look not only at the executive purpose but also at the end result. We must be

sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree." Supra at p. 704.

This should come as no surprise to Petitioner here for this Court has repeatedly reaffirmed its statement in *Cantwell* v. *Connecticut,* 310 U.S. 296, that the First Amendment enhances two concepts freedom to believe and freedom to act. "The first is absolute, but in the nature of things, the second cannot be." *Supra* at pp. 303-4.

The religious accommodation urged by Petitioner cannot be made by this Court without striking a fatal blow at the heart of the Constitution. A foreseeable consequence is preferential treatment in the form of additional holidays or prime time off to those holding religious beliefs as opposed to those possessing atheistic or non-orthodox beliefs.

Dewey at bottom, is asking this Court to hold that a private employer must continue to employ one who is unavailable for work at various times if the unavailability stems from the exercise of his religious convictions. Reynolds he argues, must single out those whose behavior is religiously motivated, even though it denies such treatment to others whose identical behavior (in this case inability to work on Sundays) is not religiously motivated. Clearly the Statute is being utilized in support of preferential treatment for a religious belief without regard to its impact on the other employees in the plant. Thus a direct primary effect of acceptance of the Commission's Guidelines is the advancement of religion and particular religious sects. This the government cannot

do without directly violating the Establishment Clause of the First Amendment.

This Court was obviously of a like mind in December 1970 when it saw no reason to disturb the right of the State of California, as an employer, to require Stimpel to meet the uniform availability of work requirements for his job as a construction inspector. Similar reasoning dictates a similar result here.

It is precisely because of this distinction that *Sherbert* v. *Verner, supra,* becomes inapposite, for under the Court's decision there the State of South Carolina was not being compelled to make any accommodation.

Further that case involved state action not private action as the District Court below in Dewey noted.[13] And as Justice Brennan observed in the Court's opinion in *Sherbert,* recognition of the claimant's right to unemployment benefits under the statute did not "serve to abridge any other person's religious liberties." *Supra* at 374 U.S. 409.

Dewey on the other hand presents a case involving two private parties. In this sense it is set apart from most of the First Amendment cases which have been before the Court usually on a challenge to some specific act of a government body or authority. And unlike those other cases Petitioner seeks not a shield against discriminatory treatment he desires one for it with the support of the government. This it cannot furnish without running aground of the First Amendment.

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[13] This point obviously was of concern to District Judge Fox for he openly mused as to *Sherbert's* relevance on this ground. 300 F. Supp. 709, 714, 1 FEP Cases 759, 763 (1969).

The Circuit Court below well recognized the dangers inherent in the EEOC position:

> "To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. . . ." *Supra* at 429 F. 2d. 334, 2 FEP Cases 870.

The basic effect of the religious accommodation requirement is to promote the imposition of religious beliefs upon unwilling persons who are protected by the wall of the First Amendment guaranteeing separation of Church and State. The religious practices of the Petitioner may not be constitutionally promoted by the government even under the otherwise welcome standard of equal employment opportunity.

B. THE CIVIL RIGHTS ACT SHOULD NOT BE CONSTRUED TO INVEIGH AGAINST THE NATIONAL LABOR POLICY FAVORING VOLUNTARY ARBITRATION OF LABOR DISPUTES

From the time *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 40 LRRM 2113 (1957), was decided this Court has followed a virtually unswerving path in making voluntary arbitration one of the keystones of the nation's labor policy. In the "Steelworker Trilogy" [14] the Court created the framework for the policy. Later cases added to the substance, particularly by making utilization of the grievance-arbitration provisions a prerequisite to a court suit. *Republic Steel Corp.* v.

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[14] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960), *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 46 LRRM 2416 (1960), *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

Maddox, 379 U.S. 650, 58 LRRM 2193 (1965), *Vaca* v. *Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967).

Finally, in *Boys Markets, Inc.* v. *Retail Clerks*, 398 U.S. 235, 74 LRRM 2257 (1970), the Court corrected the only deviation from its otherwise consistent path by holding that Federal courts have power to enjoin strikes in violation of a collective bargaining agreement where the issue in the strike is subject to an arbitration provision.

1. The National Labor Policy requires that arbitration awards be binding upon participating employees whose claims are considered

This Court for fourteen years has taken a consistent position regarding the appropriate forum for disputes between the parties to labor agreements: final and binding arbitration is the preferred method of settling disputes arising out of the employment relationship. The key to the acceptance of this policy is, of course, the "final and binding" nature of the arbitration.

The Court has recognized the necessity that the arbitration award be final and binding by heretofore requiring employees attempting to assert a claim previously considered by an arbitrator to first prove that they were unfairly represented in the arbitration proceeding. *Vaca* v. *Sipes, supra.*

The necessity for mutuality in the arbitration process was further emphasized in *Boys Markets.* As Mr. Justice Brennan noted:

> "The Sinclair decision, however, seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices. Clearly employers will be wary

of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking." 74 LRRM 2263.

To carve out an exception to the carefully and consistently developed national labor policy, as Petitioner urges, is patently unfair to the employer. Currently 69% of the collective bargaining agreements in the country contain very explicit "no discrimination" clauses.[15] Most of these clauses are remarkably similar to the requirements of Title VII.[16]

However, employers confronted with the result urged by Petitioner (*i.e.* if the employer loses in arbitration it is final but if he wins the employee starts over in the courts) will quickly realize that this double exposure can be eliminated by excluding claims of discrimination from arbitration. It is submitted that such a result is both undesirable and unecessary.

2. The most desirable method for dealing with claims of discrimination is arbitration where such claims are cognizable under a labor agreement

Since the vast majority of labor agreements provide prohibitions against discrimination substantially similar to those provided by Title VII, arbitration provides

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[15] *Basic Patterns in Union Contracts*, 7th Ed. BNA, February 1971.

[16] A typical clause reads as follows: "Neither the Company nor the Union will discriminate in any manner against any employee because of race, religion, creed, national origin or sex as provided by Title VII Civil Rights Act 1964 as amended." Taken from the collective bargaining agreement between the Norwich Pharmacal Co. and Chemical Workers Union as published in *Collective Bargaining Negotiations and Contracts*, p. 95:482, BNA.

a ready-made forum for the handling of these claims with a number of advantages over the courts.

From the employee's point of view, arbitration provides faster relief if relief is warranted, is considerably less expensive since the union provides representation for him, and at the same time is generally considered fair.

From the employer's point of view, arbitration is faster,[17] less expensive, and is a method of dispute resolution with which he is familiar.

From the union's point of view, arbitration of discrimination claims permits it to represent the employees in *all* of their dealings with the employer, rather than fragmatizing the union's representation status.

It was these very same considerations which lead the Court to the result reached in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 58 LRRM 2193 (1965). As the Court noted there:

> "And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> "A contrary rule which would permit an individual employee to completely side-step available grievance procedures in favor of a lawsuit has little to commend it." 379 U.S. at 653

In addition, arbitrators are undoubtedly better qualified to deal with claims of discrimination arising out of

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[17] This of course can be an extremely critical factor to both the employer and the employee when there is the possibility of back pay with running liability involved.

the employment relationship than are the courts. Arbitrators deal with questions of industrial practices including discipline and discharge on a day-to-day basis. Such daily contact equips them to readily distinguish between real and purported reasons for discipline and discharge. They are also familiar with the needs and practices of the employing industry and if necessary can make on site inspections. In *Steelworkers* v. *Warrior and Gulf Nav. Co.*, Mr. Justice Douglas compared the competence of the arbitrator and the courts and the courts with regard to industrial disputes.

> "The labor arbitrator performs functions which are not normal to the courts, the consideration which helps him fashion judgments may indeed be foreign to the competence of courts. . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." 363 U.S. at 581-582.

The courts on the other hand are not only ill-suited to deal with these problems, but the tremendous increase in this type of litigation cannot help but exacerbate the growing crisis caused by overburdening caseloads.

3. The doctrine of collateral estoppel is properly applicable to claims of discrimination which have previously been voluntarily submitted to arbitration under a labor contract

Those who argue that an employee should not be bound by the arbitration award; base their argument on two grounds: (1) the employee is asserting two different rights, one contractual and the other statutory; and (2) the arbitrator may not consider the full statutory claim of the employee or may be precluded from doing so by some other section of the agreement.

As has already been shown, the first ground may not exist in a large number of cases where the contractual prohibitions on discrimination are virtually identical to the statutory prohibitions. In these cases there are not two separate rights, but rather one right expressed in two different places.

The second ground may be a valid consideration, but to hold that all arbitration awards are non-binding on the employee involved because some arbitrators may not consider the correct criteria is simply to throw the baby out with the bath water. Fortunately, such an all or nothing choice need not be made. The equitable doctrine of collateral estoppel is peculiarly suited for use by the courts in the situation here:

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered . . . the inquiry must always be as to the point of question actually litigated and determined in the original action, . . . only upon such matters is the judgment conclusive in another action. . ." *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876). See also *Restatement of Judgments*, Sec. 68.

This doctrine has been invoked and applied to administrative proceedings under the Civil Service Act (*Bentley* v. *Teton*, 153 N.W. 2d 495) in the Court of Claims; (*Delatush* v. *United States*, 151 Ct. Cl. 405) and before the Interstate Commerce Commission (*N.Y.S. & W.R. Co.* v. *Central R. Co. of N. J.*, 156 NYS 2d 199).

The use of collateral estoppel by the district courts in the present circumstances would of course permit the employee who lost in arbitration to go to court.

The Court however would only hear the case if it found that the arbitrator's consideration of the claim under the labor agreement departed from the statutory standards or if it found procedural irregularities in the proceedings. Otherwise the case could be quickly disposed of on the employer's motion for summary judgment.

It is submitted that such an approach would be in conformity with Title VII and would enhance its effectiveness without detracting from the national labor policy or further overburdening the courts.

IV. CONCLUSION

For the foregoing reasons the decision of the Court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1970

No. 835

ROBERT KENNETH DEWEY,

Petitioner,

v.

REYNOLDS METALS COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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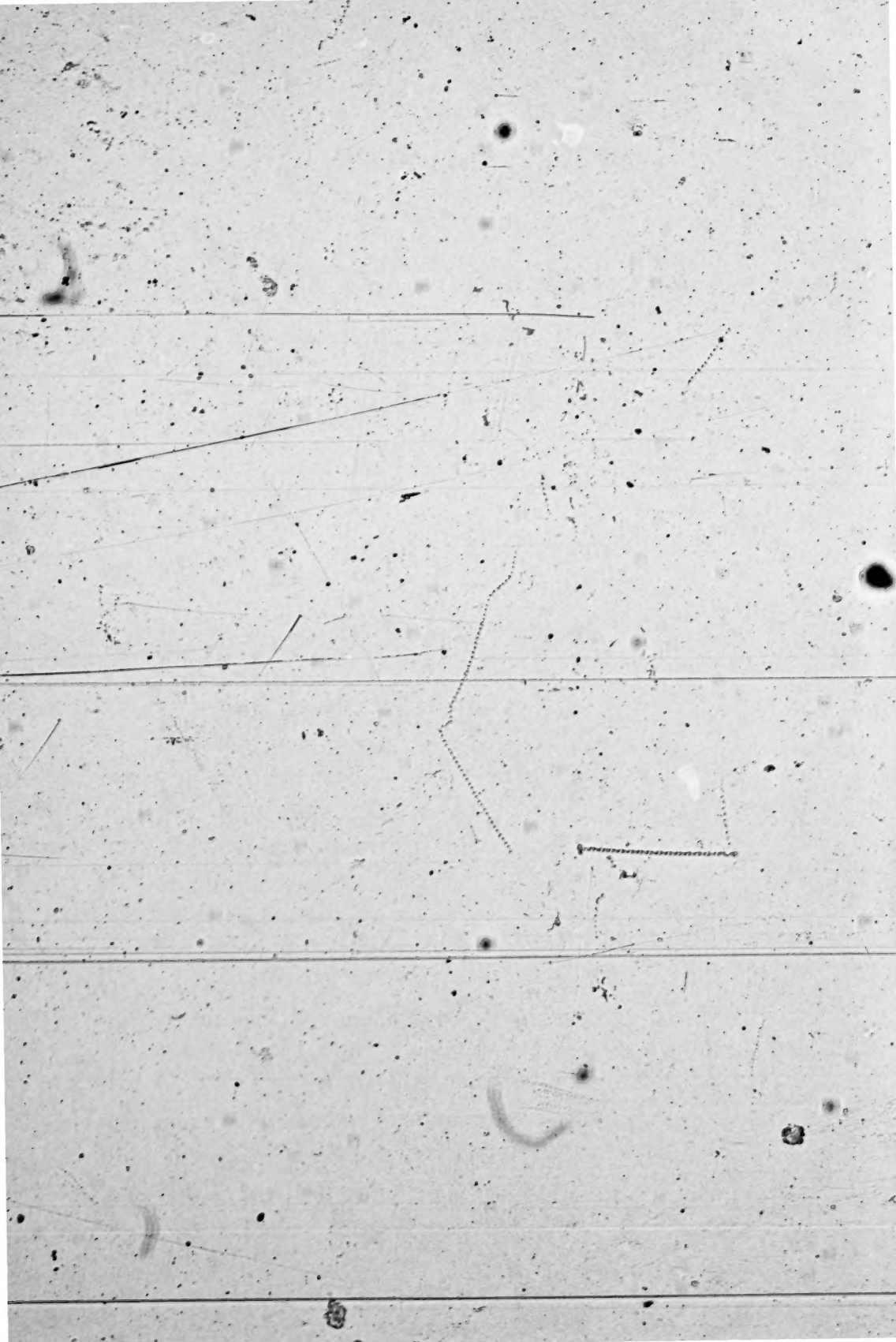

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BRIEF OF AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

This brief is submitted by the American Jewish Congress, *amicus curiae*, conditionally upon the granting of the motion for leave to file to which it is attached. The interest of the American Jewish Congress is set forth in that motion.

Preliminary Statement

Petitioner Dewey was employed by the respondent Reynolds Metals Company for fifteen years prior to his discharge in 1966. In 1960 and in subsequent years, the collective bargaining agreement between Reynolds and the United Automobile Workers, of which Dewey is a member, permitted the company to set overtime schedules and required employees to work such schedules unless they had a substantial and justifiable reason for not doing so.

In 1961, Dewey became a member of the Faith Reformed Church, which forbids Sunday employment. It was not until late 1965, however, that the Reynolds plant began to operate on a "six-plus" week, which meant regularly scheduled Saturdays and numerous Sundays. Under this schedule, Sunday overtime became compulsory for the employees. In September 1965, Reynolds issued an interpretation of the Labor Agreement which permitted an employee scheduled for overtime to obtain a qualified replacement. Dewey found substitutes for five assigned Sundays between January and August 1966. However, on August 28, September 4 and September 11, he refused for religious reasons to ask others to work in his stead. Because of his refusal to obtain replacements, he was discharged on September 12, 1966.

Dewey began grievance proceedings following his discharge, eventuating in an arbitration award on June 29, 1967, holding that respondent had not violated the union

contract. On September 15, 1966 Dewey filed a charge of discrimination with the Michigan Civil Rights Commission which found insufficient grounds to issue a complaint. On January 4, 1967, Dewey filed a charge with the Federal Equal Employment Opportunity Commission (EEOC), which found reasonable cause to believe Reynolds had engaged in an unfair employment practice under Section 703(a)(1) of Title VII ("Equal Employment Opportunities") of the Civil Rights Act of 1964 (42 USC 2000e-2). Thereafter, he was informed by the EEOC that its efforts at conciliation had failed and that he could file suit under Section 706 of Title VII (42 USC 2000e-5(e)). Accordingly, Dewey filed this suit in the U.S. District Court for the Western District of Michigan.

The District Court, relying upon this Court's decision in *Sherbert v. Verner*, 374 U.S. 398, and the Commission's Guidelines on Discrimination Because of Religion, issued July 10, 1967, 29 C.F.R. 1605.1, 32 Fed. Reg. 10298-9, held that Reynolds' discharge of Dewey constituted religious discrimination in violation of Title VII. The Court of Appeals for the Sixth Circuit, with one judge dissenting, reversed, finding nothing discriminatory in Reynolds' compulsory overtime rule. The majority held that the District Court should have applied an earlier version of 1605.1, adopted in 1966, and that Reynolds had complied with that regulation. Even under the 1967 regulation, Reynolds was thought to have made a reasonable accommodation to the religious needs of its employees by its replacement system. Finally, the court held that, under Title VII, suit may not be brought after a grievance has been finally adjudicated by arbitration.

Question to Which This Brief is Addressed

This brief is addressed solely to the question whether petitioner's discharge for a refusal to work overtime on Sunday or to request an employee to take his place is discrimination in employment because of religion as proscribed by Title VII of the Civil Rights Act of 1964.

Statutory Provision Involved

Section 703 of the Civil Rights Act of 1964 (42 USC 2000e-2) provides in part as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *

Summary of Argument

I. The EEOC's interpretation of the rights of Sabbath observers under the Civil Rights Act of 1964 is entitled to great weight. The courts have consistently paid deference to the interpretative regulations of administrative agencies. The interpretation of the 1964 Act here under review is a contemporaneous effort by the men charged with its administration to give content to the statutory prohibition of discrimination and to insure achievement of the legislative purpose. To sustain the EEOC's interpretation of the statute, the Court need find only that it was reasonable.

II. The statutory prohibition of discrimination in employment may be violated by practices that have a discriminatory exclusionary effect on specific religious groups.

A. The statutory prohibition includes acts having a discriminatory impact. If the employer need not give his employees reasonable opportunity to practice sincerely held beliefs, the statutory protection against discrimination on the basis of religion would be substantially reduced. It was therefore appropriate for the EEOC to look to the impact of the employer's policy on adherents of a specific religious group and not to limit itself solely to the question whether the employer had adopted a rule that applied equally to all employees.

B. Other prohibitions of discrimination have been construed as applying to acts that have a discriminatory impact. This is true of the prohibition of discrimination among religious groups under the Freedom of Religion Clause of the First Amendment. It is true also of the prohibition of discrimination contained in the constitutional guarantee of equal protection.

Finally, the prohibition of discrimination contained in the National Labor Relations Act, which closely parallels that of the Civil Rights Act of 1964, has similarly been construed as prohibiting discrimination having the effect of discouraging or encouraging union membership, even absent a discriminatory intent on the part of the employer.

III. A. The Guidelines adopted by the EEOC in 1967 were consistent with the principles outlined above and constituted a reasonable interpretation of the statute. They represented a reasonable balance between the needs of em-

ployers and the statutory objective of equality. The employer here was required to make only a small accommodation to the religious beliefs of the petitioner. It was prepared to accept substitutes for those employees who could not work on Sunday and therefore was required only to relieve petitioner of the duty of finding such substitutes.

The court below appears to have found not only that this requirement was unreasonable but that the petitioner's religious beliefs were unreasonable. This constituted an improper intrusion by the court upon the realm of religious belief.

B. Even if the court below properly found that this case was governed by the Guidelines adopted by the EEOC in 1966, rather than those of 1967, the same result should be reached. Under both regulations, the EEOC made a reasonable judgment as to the requirements imposed by the statute on employers. According to their express terms, the 1966 Guidelines clearly prohibited petitioner's discharge.

Argument

The decision of the Court of Appeals rested primarily on its conclusion that the Federal law barring discrimination in employment—Title VII of the Civil Rights Act of 1964—does not apply to the kind of situation here involved. It held that the statutory prohibition of discrimination is not violated when an employer adopts a rule applicable to all employees, even though it has the effect of excluding from employment members of those religious sects that observe a particular day of the week, or any day of the week, as a day

of rest. This holding is fundamental to the decision below, even though there are subsidiary issues, and it is to that holding that we address our argument here.

I

The EEOC's interpretation of the Civil Rights Act of 1964 protecting the rights of Sabbath observers is entitled to great weight.

In the case of a statute such as Title VII, "where emphasis is placed on voluntary compliance with the requirements of nondiscrimination, and where there is a general lack of guiding precedent, the promulgation of reasonable interpretive guidelines" is of particular importance. *American Newspaper Association v. Alexander*, 294 F. Supp. 1100, 1103 (D.D.C., 1968).[1]

Interpretative rulings do not have the same basis in law as regulations issued under express statutory authority. Indeed, the Attorney General's Committee described the latter as "legally binding." Final Report, *supra*, at 100. However, it went on to say (*ibid*):

> This distinction between statutory regulations and interpretative regulations is, however, blurred by the

1. The authority of the EEOC to issue and apply interpretative guidelines is not in question in this case. It is a settled principle of administrative law that, "In addition to the power to enact legally binding regulations conferred upon many of the agencies, all of them may, if they wish, issue interpretations, rulings, or opinions upon the laws they administer, without statutory authorization to do so." Attorney General's Committee on Administrative Procedure, Final Report 99 (1941). The statutory authority of the Equal Employment Opportunity Commission to "issue, amend, or rescind suitable procedural regulations," conferred by Section 713(a) of the Act (42 U.S.C. 2000e-12) is therefore augmented by the agency's inherent power to issue interpretative regulations which may or may not be given the force of law by the courts.

> fact that the courts pay great deference to the interpretative regulations of administrative agencies especially where these have been followed for a long time.

In support of that statement, the Committee cited this Court's statement, in *Brewster v. Gage*, 280 U. S. 327, 336 (1930) that

> * * * it is the settled rule that practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons.

This principle of judicial "deference" has been repeatedly applied by this Court. *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Zemel* v. *Rusk*, 381 U. S. 1 (1965); *Power Reactor Development Co.* v. *International Union of Electricians*, 367 U. S. 396 (1961); *NLRB* v. *Hearst Publications*, 322 U. S. 111 (1944); *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (1944); *United States* v. *American Trucking Assoc.*, 310 U. S. 534 (1940). See also the discussion below (pp. 16-17) of *NLRB* v. *Erie Resistor Corporation*, 373 U. S. 221 (1963).

This Court has stated further, in *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933), that respect is particularly due when the practice "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." The 1966 and 1967 Guidelines issued by the Equal Employment Opportunity Commission were a virtually contemporaneous effort by the men charged with the administration of new Federal machinery to give content to newly enacted statutory prohibitions against discrimination in employment and to insure

that the Act served its legislative purpose. In 1966 and again in 1967, faced with complaints filed by "Sabbath observers," the Commission found it necessary to relate the general language of the statute to the rights of such individuals before it. Its expatiation upon the bare-boned statutory prohibition against discrimination with respect to this group whose religious practices conflict with the rules imposed by their employers is entitled to more weight than was given it by the Court of Appeals.

The EEOC guidelines on discrimination on the basis of sex were given decisive weight in *Weeks* v. *Southern Bell Telephone*, 408 F. 2d 228, 235 (5th Cir. 1969), largely on the authority of *Udall* v. *Tallman, supra*. See also Justice Marshall's concurring opinion in *Phillips* v. *Martin Marietta Corporation*, 91 S. Ct. 496, 498 (1971).

Finally, the correct judicial posture towards an EEOC guideline was set forth in a case upholding EEOC guidelines concerning job opportunities advertising. *American Newspaper Publishers Association* v. *Alexander, supra*. Said the court (294 F. Supp. at 1103):

> When Section 713(a) and (b) of Title VII are read together it is apparent that Congress intended that the Commission should have the authority to issue and publicize its interpretations of the meaning of the provisions of Title VII. The promulgation of interpretative guidelines is a necessary function of an agency which is entrusted with the duty of administering a statute.

While recognizing that the guideline was not binding upon it and that it was free to interpret the statute differently, the Court went on to conclude that the guideline formulated

represented a reasonable interpretation of the statute and that it was within the Commission's authority.

To sustain the Commission's interpretation of the statute it administers, this Court need not find that the agency's construction is the only reasonable one, or even that it is the result which would necessarily have been reached had the question arisen in judicial proceedings in the first instance. Rather, if the Commission's interpretation is a reasonable one, it should be upheld. *Unemployment Compensation Commission of Alaska* v. *Aragan*, 329 U. S. 143, 153-154 (1946).

II

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 may be violated by employment practices which, although applicable to all employees, have a discriminatory exclusionary effect on specific religious groups.

A. The prohibition of discrimination in Title VII includes acts having a discriminatory impact.

The basic legislative objective of Title VII is to prohibit discrimination by private employers on the basis of an employee's race, color, religion, sex or national origin. If an employer need not give his employee reasonable opportunity to practice sincerely held beliefs, assuming no undue burden is placed upon the conduct of the employer's business, the protection provided by Title VII against discrimination on the basis of religion would be substantially reduced.

We submit, therefore, that the District Court properly looked to the impact of the respondent's policy on the employment of the adherents of a specific religious group and declined to limit itself to the sole question whether respondent had adopted a rule that applied equally to all employees.

This interpretation of the meaning of "discriminate" as used in Section 703(a)(1) is strengthened by the provisions of Section 703(h), which limits the scope of 703(a)(1) in one respect. It permits an employer to give, and act upon the results of, an ability test, provided that "such test, its administration or action upon the results is not *designed, intended or used* to discriminate * * *" (Emphasis supplied.) This section thus recognizes a distinction between designed and intended discrimination and discrimination resulting from usage absent the element of intent, and recognizes also that both are covered by Section 703(a)(1).[2]

B. Other prohibitions of discrimination have been construed as applying to acts that have a discriminatory impact.

The interpretation of Section 703(a)(1) urged above is not novel. This and other courts have generally construed

2. We submit that the Court of Appeals erred in basing its decision in part on Section 706(g) (42 USC Section 2000e-5(g)) which provides that the District Court, upon application, shall enjoin an unlawful employment practice if it finds that the employer "has intentionally engaged in" such a practice. There is no reason to believe that this language requires the court to ascertain anything more than that the employer intended to engage in conduct which violates the statute—and there is, of course, no question here that respondent intended to apply a policy of employment that excluded persons holding petitioner's religious beliefs. The interpretation apparently applied by the court would make some types of discriminatory practice subject to court order while leaving others beyond the reach of the courts.

constitutional and statutory prohibitions of discrimination as applying to actions having a discriminatory impact, even when there was no showing of a discriminatory intent. It is entirely appropriate, we submit, to consider those decisions as applicable here because they illuminate the meaning of discrimination as used in our law generally. They represent a general trend in the law toward treating discrimination as an evil that requires correction regardless of its origin. Indeed, these cases, by shifting emphasis from intent to effect, establish the general principle that discrimination is independent of malice.[3]

1. *Discrimination among religions under the Freedom of Religion Clause of the First Amendment.* A leading case which defines discrimination on the basis of religion so as to encompass rules discriminatory in effect, though not in motivation, is *Sherbert* v. *Verner*, 374 U.S. 398 (1963). In *Sherbert*, rejecting the argument (also made by respondent here) that a rule applied equally does not discriminate, this Court held (at 403-4):

> In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact. * * * But this is only the beginning, not the end, of our inquiry. For "/i/f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate individually between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." Braunfeld v. Brown, [366 U.S. 599, 607 (1961)].

3. The fact that this trend has developed along parallel lines under different prohibitions of discrimination may be a belated recognition in our post-Freudian times that intent has both conscious and unconscious components, and that unconscious factors are difficult to elicit.

The court below dismissed *Sherbert*, in a single sentence, on the ground that it involved state, not private action (Pet. App. 47a).* This, we submit, cannot conclude the matter. *Sherbert* is relevant because of its definition of *discrimination*, particularly in the context of religious practices. As the District Court correctly pointed out: "The importance of *Sherbert* to this analysis is not its holding on constitutionality, but its definition of discrimination—a definition which is equally valid whether employed to measure private or state action" (Pet. App. 25a and 26a).

2. *The constitutional guarantee of equal protection.* This Court has frequently held that intent is not a necessary element in sustaining a claim of denial of the guarantee of equal protection contained in the Fourteenth Amendment. Thus, in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), it considered the validity of a state statutory requirement that persons appealing convictions furnish a bill of exceptions or report of proceedings in the trial court, a requirement that frequently included the necessity of supplying a stenographic transcript of the trial. This requirement had the effect of discriminating against poor persons who could not afford the expense of obtaining a transcript. There was no suggestion that the requirement was designed to deprive poor persons of the right to appeal. Yet this Court held that it constituted a denial of equal protection. It said (at 17, n. 11):

> Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation. For example, this Court struck down the so-called "grandfather clause" of the Oklahoma Constitution

* References to (Pet. App.) are to the Appendix to the Petition for Certiorari.

as discriminatory against Negroes although that clause was by its terms nondiscriminatory. Guinn v. United States, 238 U.S. 347, 35 S. Ct. 926, 59 L.Ed. 1340. See also Lane v. Wilson, 307 U.S. 268, 59 S. Ct. 872, 83 L.Ed. 1281.

Similarly, in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 666, n. 3 (1966), in invalidating Virginia's poll tax, this Court said that, although the "'Virginia poll tax was born of a desire to disenfranchise the Negro'" (*Harman* v. *Forssenius*, 380 U.S. 528, 543), we do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end."

The most recent example of the focus upon effect in Equal Protection cases is *Hawkins* v. *Town of Shaw*, —— F. 2d —— (5th Cir., decided January 28, 1971). In that case, the Fifth Circuit Court of Appeals held that a Mississippi town must provide equal services to Negro residents, even though the record contained "no direct evidence aimed at establishing bad faith, ill will or an evil motive on the part of the Town of Shaw and its public officials."

3. Decisions under the National Labor Relations Act. The courts have also looked beyond the requirement of intent or the claim of uniform application in cases arising under the National Labor Relations Act. Section 8(a)(3) of that Act, 29 U.S.C. 158(a)(3) (1958 ed.), declares that it shall be an unfair practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *" As in Title VII, discrimination is not defined in the NLRA, nor

is the Act explicit in requiring that a discriminatory practice be intentional.

In *Republic Aviation Corporation* v. *NLRB*, 324 U.S. 793 (1945), this Court considered whether a claim of impartial, uniform enforcement of an employer's rule might defeat a charge of discrimination raised by employees discharged for union solicitation. Although the employer's rule was a general one prohibiting solicitation of any type in its plant or offices, this Court held (at 805) that

> if the rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that rule discriminates within the meaning of Section 8(3) in that it discourages membership in a labor organization.

While proof of a deliberate intent to discourage or encourage union membership by discrimination is undoubtedly relevant in Section 8(a)(3) cases, it is not essential. This is the express holding of *Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954). In one of the proceedings disposed of in that decision, the employer was charged with violating Section 8(a)(3) by giving wage increases to union members, while refusing to give them to non-union members, "on the grounds that it was not contractually bound to do so, and, in its business judgment, did not choose to do so" (at 36). The company relied on the fact that there was no evidence of discriminatory purposes (*ibid*) and the Court noted that the Labor Board had considered "that the employer acted from self-interest and not to encourage unionism" (at 37). Nevertheless, the Court upheld the Labor Board's finding that Section 8(a)(3) had been vio-

lated, saying (at 44) that "specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation." The recognition that specific proof of intent was unnecessary where employer conduct "inherently" encouraged or discouraged union membership was said to be "an application of the common law rule that a man is held to intend the foreseeable consequence of his conduct" (at 45). In other words, this Court ruled that certain employer conduct is so inherently destructive of the employee's rights that it is violative of the statute, regardless of motive.

The rationale of the *Radio Officers* case was applied by this Court in *NLRB* v. *Erie Resistor Corporation*, 373 U.S. 221 (1963), where it held that a super-seniority system that discriminated against strikers violated Section 8(a)(3) despite the employer's unchallenged assertion that "its overriding purpose in granting super-seniority was to keep its plant open and that business necessity justified its conduct" (at 225-6). This Court said (at 228):

> But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.

Here, of course, respondent knew that its policy discriminated against those whose religious principles prevent them from working on Sundays and from getting replace-

ments, and it must have known and intended the exclusion of such persons from employment.

It is particularly significant that this Court in *Erie Resistor* rested its decision in large part on the Labor Board's analysis of the problem. Upholding the "balance" which the Board had struck between the business interests of the employer and the objectives of the statute, it said (at 236):

> The matter before the Board lay well within the mainstream of its duties. It was attempting to deal with an issue which Congress had placed in its hands and "[w]here Congress has in the statute given the Board a question to answer, the courts will give respect to that answer."

The principles laid down in these cases were reaffirmed and applied by this Court in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) (payment of vacation benefits to nonstrikers but not to strikers), and *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967) (employment of new employees before rehiring former strikers).

III

This Court should uphold the EEOC's interpretative ruling concerning the employment of Sabbath observers.

A. The 1967 Guidelines

As noted above, this action was started following a ruling by the EEOC that respondent had violated Title VII by its discharge of petitioner. That finding was made pursuant to a policy laid down in an interpretative ruling

which set forth guidelines on discrimination because of religion. The Guidelines, as formulated in 1967 (29 C.F.R. 1605.1), provided in relevant part that "* * * the duty not to discriminate on religious grounds * * * includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employers and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." We submit that this ruling is consistent with the interpretation of the statute, discussed in Point II, above, that the ban on discrimination applies to practices having a discriminatory impact.[4] For the reasons stated in Point I above, it should be upheld by this Court because it represents a reasonable balance between the needs of employers and the statutory objective of equality.

Surely, the employer who refuses to make a reasonable accommodation to the religious needs of his employee, if he can do so without an undue hardship on the conduct of his business, cannot be heard to argue that he does not discriminate. The commonsense significance of his refusal

4. It might be argued that, even if it is necessary under Title VII to show a discriminatory intent as well as a discriminatory impact, the EEOC Guidelines represent a reasonable way of dealing with the difficult problem of proving discrimination. See Note, "An American Legal Dilemma—Proof of Discrimination," 17 U. of Chi. L. Rev. 107 (1949); Lamb, "Proof of Discrimination at the Commission Level," 39 Temple Law Quarterly 299 (1966). On this theory, the EEOC's Guidelines could be viewed as being based on the widespread recognition that employers normally deny discrimination and that it is always difficult to prove it. The absence of evidence of reasonable accommodation could reasonably be treated as creating a rebuttable presumption of discriminatory intent. The employer's obligation to establish undue hardship would be no more than the obligation to rebut the presumption.

establishes the reasonable relationship between the duty not to discriminate and the obligation to accommodate.

The majority below rejected the EEOC's 1967 Guidelines as having the effect of compelling an employer to accede to or accommodate the religious beliefs of his employees. This, it said, raised grave questions under the Establishment Clause.[5] Pet. App. 57a and 58a. While it is true that, under the Guidelines, the burden of proof is on the employer to show an undue hardship upon his business operations, it is inaccurate to speak in terms of coercion or compulsion. The Guidelines require only a "reasonable" accommodation to the religious needs of the employee. The concept of reasonableness, certainly not a novel one in the law, prescribes a standard of behavior which should be possible to apply to individual instances.[6] Placing this obligation on the employer is a far cry from coercion or compulsion.

The employer here was prepared to accept substitutes for those employees who could not work on Sunday because of their religious beliefs. The only further accommodation that would have been required in order to bring

5. This bogey of the Establishment Clause was, we submit, effectively disposed of in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963). In *Sherbert*, the Court said:

> In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.

6. The concept of "reasonable accommodation" also appears in the EEOC's Guidelines on Discrimination Because of Sex. 29 C.F.R. 1604.1.

it within the EEOC regulation was that it find the substitutes itself. There is no evidence to suggest that this would have been impossible or even difficult.

The court below appears to have relieved respondent of the necessity of making this accommodation at least in part because it regarded Dewey's view of his religious obligations as unreasonable. The court recognized, and indeed it was unquestioned, that Dewey regarded the obtaining of replacements as a sin (Pet. App. 49a). It went on to say:

> He apparently did not regard it as sinful for him to collect wages from an employer who was compelled to schedule overtime production in order to meet its contractual commitments and eventually meet its payroll.

This comment has no possible relevance except to throw doubt on either the sincerity of Dewey's belief or the obligation of the court to give it weight.

In raising a question concerning the validity of Dewey's unusually strict view of his Sabbatarian obligations, the Court of Appeals entered territory forbidden to the courts. This was made clear by this Court in *United States* v. *Ballard*, 322 U.S. 78, 87 (1944):

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Dewey's view that he could not obtain replacements even though he could collect wages from an employer who sched-

uled Sunday work may have seemed "incredible, if not preposterous," to the Court of Appeals. But the court could not properly base its decision on that conclusion.

B. The 1966 Guidelines

The court below regarded the EEOC's Guidelines as now embodied in 29 C.F.R. 1605.1 as inapplicable to the present case because they were adopted in June 1967, after Dewey was discharged. It found that the earlier version of 1605.1, adopted on June 9, 1966 (31 Fed. Reg. 8370) was significantly different. We submit that, even if the 1967 Regulation is held inapplicable to Dewey, the 1966 version also required an accommodation to the reasonable religious needs of an employee where that could be made without serious inconvenience to the conduct of the business.

Circuit Judge Combs, in dissenting from the majority view, correctly pointed out that "the cornerstone of both the 1966 and 1967 Regulations is the obligation of the employer to accommodate the religious needs of employees where such accommodations can be made without undue hardship on the conduct of the employer's business." See 1605.1(a)(2) of 1966 Regulation and 1605.1(b) of 1967 Regulation. In the 1966 Regulation, the obligation was to "accommodate the reasonable religious needs" of employees where that could be done without "serious inconvenience." The 1967 Regulation on the other hand, speaks in terms of a "reasonable accommodation" and "undue hardship." We maintain that these variations in language indicate that the employer's obligation under the 1966 interpretation was at least as stringent as under the 1967

interpretation, and possibly more stringent. Nevertheless, the majority below reasoned that the obligation to accommodate was "restricted" by the provisions of Sections 1605.1(a)(3) and 1605.1(b)(3) in the 1966 version, which were apparently thought controlling in Dewey's case.

A closer examination, however, yields the conclusion that those sections referred to by the majority are not dispositive of Dewey's case. Section 1605.1(a)(3), it should be noted, relates to a "normal" work week, not compulsory overtime. Section 1605.1(b)(3) declares that an employee who accepts a job knowing that its requirements would conflict with his religious obligations is not entitled to demand an accommodation. Under the stipulated facts, Dewey was employed by Reynolds in various capacities since 1951. Although Dewey became a member of the Faith Reformed Church in 1961, a year following the Labor Agreement between Reynolds and the Union which allowed Reynolds to set compulsory overtime schedules, it was not until 1964 that the plant operated on a "five plus" schedule, utilizing Saturdays as overtime, and not until late 1965 and 1966 that the plant operated on a "six plus" schedule, utilizing Saturdays regularly and numerous Sundays. See Stipulation of Facts, paragraphs 1, 3, and 7. Dewey's conflict between his religious needs and his employer's requirements thus arose long after he came to work for Reynolds, and long after his conversion to the Faith Reformed Church.[7]

7. Under the 1960 Labor Agreement and subsequent agreements between the union and Reynolds, employees could be exempted from compulsory overtime schedules for a "substantial and justifiable reason." Stipulation of Facts, Paragraph 7. Even accepting the majority's reliance upon Section 1605.1(b)(3), the rights vested in Dewey by the Labor Agreement were entitled to recognition.

Under the 1966 Guidelines, therefore, as well as under the 1967 version, Dewey was entitled to have the employer make the small accommodation to his religious faith that would have enabled him to continue working without violating his religious principles.

Conclusion

It is respectfully submitted that the court below erred in holding that Title VII of the Civil Rights Act of 1964 does not bar employer policies that discriminate against employees by failing to make reasonable adjustments to their religious principles.

Respectfully submitted,

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DEWEY *v.* REYNOLDS METALS CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 835. Argued April 20-21, 1971—Decided June 1, 1971

429 F. 2d 324, affirmed by an equally divided Court.

Donald F. Oosterhouse argued the cause and filed a brief for petitioner.

William A. Coughlin, Jr., argued the cause for respondent. With him on the brief was *Fred R. Edney.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Leonard, David L. Rose, Stanley P. Hebert, Julia P. Cooper,* and *George H. Darden.*

Briefs of *amici curiae* urging reversal were filed by *Nathan Lewin, Samuel Rabinove,* and *Sol Rabkin* for the National Jewish Commission on Law and Public Affairs et al., and by *Paul S. Berger, Joseph B. Robison,* and *Beverly Coleman* for the American Jewish Congress.

Milton A. Smith and *Jay S. Siegel* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.